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Supreme Court of the United States

OCTOBER TERM, 1953

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, ET AL., APPELLANTS,

vs.

UNITED AIR LINES, INC., CATALINA AIR TRANSPORT AND CIVIL AERONAUTICS BOARD

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED MAY 22, 1953

Jurisdiction postponed June 15, 1953

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the U.S.D.C. for the Northern District of California, Southern Division		1
Complaint for declaratory relief and injunction	1	1
Order to show cause and temporary restraining order	11	9
Amendment to complaint	14	10
Motion to dismiss	17	11
Order convening three-judge court	20	13
Motion for leave to intervene	21	13
Points and authorities in support of motion to dismiss	23	14
Orders denying motion to dismiss as to Public Utilities Commission, granting motion to dismiss as to Edmond G. Brown, Attorney General and allowing intervention by Civil Aeronautics Board	31	21
Intervenor's complaint	33	22

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 24, 1953.

	Original	Print
Record from the U.S.D.C. for the Northern District of California, Southern Division—Continued		
Answer of Public Utilities Commission, et al. to amended complaint	39	26
Answer of Public Utilities Commission, et al. to Intervenor's complaint	45	31
Agreed statement of facts (Plaintiff's Exhibit No. 6)	51	34
Exhibits A-1 thru 10—Exchange of letters between representatives of United Air Lines, Inc. and the Public Utilities Commission, dated August 6, 1951, September 10, 1951, September 20, 1951, October 11, 1951, November 6, 1951, November 30, 1951, December 5, 1951 and December 27, 1951	55	37
Opinion, Goodman, J. and order for decree in favor of plaintiffs	65	47
Objections to findings of fact and conclusions of law proposed by plaintiffs	70	50
Objections to judgment proposed by plaintiffs	76	55
Findings of fact and conclusions of law	81	56
Judgment	91	65
Notice of entry of decree and judgment	94	67
Motion for new trial	96	68
Intervenor's answer to defendants' motion for new trial	115	87
Plaintiff's answer to motion for new trial	120	91
Order denying motion for new trial	131	104
Petition for appeal	132	105
Order allowing appeal	134	
Citation on appeal (omitted in printing)	136	
Assignment of errors and prayer for reversal	138	107
Statement required by paragraph 2, Rule 12, of the rules of the Supreme Court (omitted in printing)	194	
Bond for costs on appeal (omitted in printing)	197	
Praecipe for transcript of record (omitted in printing)	226	
Appellees' praecipe for additional records (omitted in printing)	229	
Transcript of proceedings of August 8, 1952 on motion to dismiss	231	112
Appearances	231	112
Colloquy between court and counsel	232	112
Argument by Mr. Phelps for defendants other than the Attorney General of California	236	115
Argument by Mr. Perry for defendant, Attorney General of California	263	132
Argument by Mr. Treadwell for plaintiffs	267	134
Argument by Mr. Ozment for intervenors	296	152
Colloquy	301	155

	Original	Print
Record from the U.S.D.C. for the Northern District of California, Southern Division—Continued		
Transcript of proceedings of November 21, 1952 on motion for preliminary injunction	306	158
Appearances	306	158
Colloquy between court and counsel	308	158
Opening statement by plaintiffs	310	160
Testimony of W. D. Dillworth	315	163
Offers in evidence	318	165
Testimony of Edward F. Treadwell	323	169
Testimony of Everett C. McKeage	364	195
Argument by Mr. Treadwell for plaintiff	376	202
Argument by Mr. Ozment for intervenor	392	212
Argument by Mr. Phelps for defendants	402	219
Transcript of proceedings of February 19, 1953 on motion for new trial	432	237
Appearances	432	237
Argument by Mr. Cline for defendants	433	237
Clerk's certificate (omitted in printing)	474	
Statement of points to be relied upon and designation of parts of record to be printed	475	263
Counter-designation of parts of record to be printed	482	264
Stipulation as to exhibits	488	264
Order postponing jurisdiction	492	265

[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a corporation, Plaintiffs,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Edmund G. Brown, Attorney General of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California, Defendants

COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTION—filed June 25, 1952

Now come the plaintiffs above named and, for cause of action against the defendants above named, allege:

I

That the plaintiff Catalina Air Transport is, and at all times herein mentioned was, a corporation organized and incorporated under the laws of the State of California.

II

That the plaintiff United Air Lines, Inc. is, and at [fol. 2] all times herein mentioned was, a corporation organized and incorporated under the laws of the State of Delaware and is a citizen resident of the State of Delaware.

III

That the defendant Public Utilities Commission of the State of California is a regulatory commission of the State of California; and the defendants Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, are the members of said Commission and collectively constitute said Commission, and all of the members of said Commission are citizens and residents of the State of California, and have and maintain an office within said State, District and Division.

IV

Prior to any of the times mentioned herein the Civil Aeronautics Board duly and regularly granted, under the Civil Aeronautics Act of 1938 (49 USCA Sections 401-705), a Certificate of Public Convenience and Necessity to Catalina Air Transport, dated October 13, 1939, which, as amended, authorizes it to engage in air transportation of persons and property between the mainland of the United States, at Los Angeles-Wilmington-Long Beach, Los Angeles County, California, and Avalon on Santa Catalina Island, and over the intervening high seas.

V

On the 7th day of March, 1946, said Catalina Air Transport entered into a contract with United Air Lines, Inc., which was duly approved by the Civil Aeronautics Board, by which it was agreed that United would perform and discharge all of the obligations of Catalina Air Transport under such Certificate of Convenience and Necessity, and should operate certain specified flights between said points, and should provide the airplanes and other facilities necessary to conduct air transportation (6 C.A.B. 1041). The Civil Aeronautics Board in its order provided that [fol. 3] agreements on passenger and air express rates between Catalina Air Transport and United Air Lines, Inc. should be reduced to writing and filed with the Board for approval (6 C.A.B. 1047). Pursuant to that direction United Air Lines, Inc. filed with the Civil Aeronautics Board an agreement dated June 26, 1946, covering the fares

to be charged between the mainland of the United States and Santa Catalina Island. This agreement was approved by the Civil Aeronautics Board. Subsequently, and as the rates were changed, similar agreements were filed with the Civil Aeronautics Board in the nature of amendments to the original agreement of June 26, 1946. The amendatory agreements are dated, respectively, January 30, 1948, April 11, 1949, and July 10, 1951. These agreements were approved by the Civil Aeronautics Board. Said certificate and said agreement of March 7, 1946, have ever since continued in full force and effect, and operations have been conducted over said route by United Air Lines, Inc. pursuant to said agreement.

VI

That said route commences at Los Angeles in the State of California and continues via Wilmington-Long Beach in the State of California to the offshore boundary of the State of California, and then continues over the high seas and outside the boundaries and territorial jurisdiction of the State of California for a distance of about twenty-four miles to Avalon on Santa Catalina Island, which is likewise within the State of California.

VII

That the Congress of the United States, by the said Civil Aeronautics Act of 1938 and other Acts, had prior to any of the times referred to in this complaint preempted the entire field of air commerce and air transportation covered by the route of plaintiffs herein described and assumed complete authority to regulate the said route [fol. 4] and to establish the rates and fares thereof and, in this regard, said plaintiffs allege that 49 USCA 171, defines interstate or foreign air commerce to include transportation "* * * *between points within the same state, territory or possession or the District of Columbia, but through the air space Over Any Place Outside Thereof* * * *", and 49 USCA 401, subsec. 20(a) defines interstate, overseas and foreign air commerce to mean the carriage "*by aircraft of persons or property* * * *between places in the same State of the United States through the air*

space Over Any Place Outside Thereof * * *", and 49 USCA 401, subsec. 21(a) defines interstate, overseas and foreign air transportation to mean "*the carriage by aircraft of persons or property* * * * *between places in the same State of the United States through the air space Over Any Place Outside Thereof* * * *." (Emphasis added.)

VIII

That at all times herein mentioned said route and operations thereon were entirely under the control and regulation of the Civil Aeronautics Board, and were not under the jurisdiction or control or regulation of the Public Utilities Commission of the State of California, and under said Civil Aeronautics Act of 1938 (49 USCA Section 403) and the regulations duly promulgated by the Civil Aeronautics Board pursuant thereto, said plaintiffs were and are required to file with the Civil Aeronautics Board tariffs showing the rates, fares and charges for the air transportation in said route, and to post and publish the same in accordance with the regulations of said Board, and at all times herein mentioned said tariffs have been so filed, posted and published, and said plaintiffs were and are prohibited from charging, demanding, collecting or receiving any greater or less or different compensation for said transportation than the rates, fares and charges so filed, posted and published, and at all times herein mentioned all said rates, fares and charges pertaining to said route [fol. 5] have accordingly been filed with the Civil Aeronautics Board, and not with said Public Utilities Commission of the State of California.

IX

That the said Public Utilities Commission now claims and asserts that the said route and operations are entirely under the control and regulation of the said Public Utilities Commission and that all of the rates, fares and charges on said route must be filed with the said Public Utilities Commission, and that the plaintiff United Air Lines, Inc., in failing to so file the same, has violated the provisions of Section 76(a) of the said Public Utilities Act (Section 2107 of the Public Utilities Code), and that said plaintiff has become liable for penalties in the sum of $2000 per

day for every day of such violation. Said Public Utilities Commission and the members thereof have threatened to direct the legal advisers of said Public Utilities Commission to bring suit to recover such claimed penalties unless said tariffs on said route are filed with said Public Utilities Commission, and plaintiffs allege that unless the same are so filed the said Public Utilities Commission and the members thereof will so direct its legal advisers, namely, the defendants Edmund G. Brown, Attorney General of the State of California, Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy and J. Thomason Phelps, to bring such suit or suits.

X

Said plaintiffs allege that the claims and assertions of the said defendants are without foundation, and said plaintiff United Air Lines, Inc. has not incurred any of said alleged penalties: First, because Congress has exercised jurisdiction and control and preempted the entire field of regulation of said route, and said route is in no way subject to the regulation and control of said defendants; and, second, that air carriers are not within the purview [fol. 6] of the provisions of the Public Utilities Act of California imposing said penalties; and, third, if those penalties are in any way applicable they are excessive, unreasonable, arbitrary, and oppressive, and impose an unreasonable burden on commerce, and amount to a taking of the property without due process of law, and constitute deprivation of the equal protection of law—all in violation of the Fourteenth Amendment to the Constitution of the United States.

XI

That plaintiffs have no plain, speedy and efficient remedy in the courts of the State of California, or otherwise than by this action, and in this regard said plaintiffs allege that said Public Utilities Act of California is claimed by defendants to impose on plaintiff United Air Lines, Inc. penalties of $2000 per day for said alleged violations of said Act, and also to impose like penalties on every employee of said plaintiff, and likewise to impose criminal

penalties on said plaintiff and its employees, punishable by fine and imprisonment for said alleged violations, and also to permit the said defendants to stand by for long periods of time during which said penalties would accumulate at the rate of $2000 per day without bringing any suit or proceeding to collect the same until the said penalties might aggregate several million dollars. Said Act further is claimed by the defendants to authorize the said defendants to bring numerous suits for so-called reparations in which said defendants claim that all rates or charges collected by plaintiff United Air Lines, Inc. may be recovered together with interest and, if the violation was willful, with exemplary damages in undefined amounts, notwithstanding the fact that all such rates and charges were fixed in all particulars in accordance with the provisions of the Civil Aeronautics Act. Under the laws of the State of California such action by the Public Utilities Commission shall not be subject to review by any court except [fol. 7] upon the question whether such decision of the Commission will result in confiscation of property.

XII

That said threatened acts of defendants are an interference with and an obstruction to interstate and foreign commerce and with the sovereign power of the Nation to control and regulate those who cross its borders, and the matter in controversy herein arises under the Constitution and Laws of the United States, and this court has jurisdiction thereof under the Commerce Clause (Article I, Section 8, Clause 3), the Common Defense and General Welfare Clause (Article I, Section 8, Clause 1), the United States Air Commerce Act of 1926 (49 USCA Sec. 171 et seq.), the Civil Aeronautics Act of 1938 (49 USCA Sec. 401 et seq.), 28 USCA Sec. 1331, and the treaty making clause (Article II, Section 2, Clause 1). That the matter in controversy herein exceeds the sum or value of $3000, exclusive of interest and costs, and arises under the Constitution and Laws of the United States; and in this regard plaintiffs allege that the value of said certificate of convenience and necessity exceeds the value of $3000, the right to enjoy the said rights under said certificate exceeds

the sum of $3000, the right to operate the said lines free of control of defendants exceeds the sum or value of $3000, and the sum or value of said penalties exceeds the sum or value of $3000, all exclusive of interest and costs.

XIII

That an actual controversy exists herein between the parties, and plaintiffs are entitled to a declaratory judgment in this court, declaring and adjudging that said plaintiffs, with respect to said route, are under the sole jurisdiction and regulation of the Civil Aeronautics Board, and that the United States has preempted the right to regulate the same, and that none of the penalties claimed by the defendants are valid and enforceable.

[fol. 8]

XIV

That plaintiffs are entitled to a writ of injunction issued out of this court enjoining said defendants from bringing any action or proceeding for the collection or payment of any of the penalties claimed by defendants, and unless such injunction is granted said plaintiffs will suffer great and irreparable damage and said defendants will bring a multiplicity of suits, actions and proceedings to enforce said penalties.

XV

That plaintiffs are entitled to a temporary injunction pending the trial of said action, enjoining the defendants from any of the acts aforesaid during the pendency of said action and until the further order of this court.

XVI

That plaintiffs are entitled to a temporary restraining order, restraining the defendants from any of the acts aforesaid until the application for a temporary injunction is heard and passed upon by this court, and said plaintiffs allege that irreparable injury, loss and damage will result to plaintiffs before a notice of application for a temporary injunction can be served and a hearing can be had thereon. In this regard, plaintiffs allege that said defendants will bring a multiplicity of suits, actions and proceedings in

different courts compelling payment of the expense of defending the same.

Wherefore, said plaintiffs pray:

1. That it be adjudged that the United States of America, by its Civil Aeronautics Act and other Acts of Congress, has preempted complete control and regulation of the route described herein, and that the defendants have no control or power of regulation over the same.

[fol. 9] 2. That it be adjudged that none of the penalties claimed by defendants are valid and enforceable.

3. That plaintiffs recover declaratory relief and that a declaratory judgment be entered herein adjudging the rights of the parties as aforesaid.

4. That if any of said penalties otherwise apply or are binding in the premises, it be adjudged that said penalties are excessive, unreasonable, arbitrary and oppressive, and constitute a taking of property without due process of law, and a deprivation of the equal protection of the law—all in violation of the Fourteenth Amendment to the Constitution of the United States.

5. That a writ of injunction issue out of this court enjoining and restraining the defendants from instituting any action or taking any proceeding for the enforcement or collection of any of the penalties claimed by the defendants.

6. That a temporary injunction, pending the trial of said action, enjoining the defendants from any of the acts aforesaid during the pendency of said action and until the further order of this court, be granted to the plaintiffs.

7. That a temporary restraining order, restraining the defendants from any of the acts aforesaid until the application for a temporary injunction is heard and passed upon by this court, be issued out of this court.

8. That plaintiffs recover their costs of suit, and have such other and further relief as may be meet in the premises.

Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, Mayer, Meyer, Austrian & Platt, John T. Lorch, Attorneys for Plaintiffs.

[fol. 10] *Duly sworn to by John A. Herlihy. Jurat omitted in printing.*

[fol. 11] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER—filed June 25, 1952

Plaintiffs having filed herein their duly verified complaint against defendants seeking an injunction enjoining defendants from bringing any action or proceeding for the collection or payment of any penalties claimed by defendants from plaintiffs growing out of the failure of said plaintiffs to file with defendants their tariffs in connection with their air route between Los Angeles-Long Beach, Los Angeles County, California, and Avalon on Santa Catalina Island, and over the intervening high seas, [fol. 12] and seeking a temporary injunction pending the trial of said action enjoining the defendants from any of the acts aforesaid during the pendency of said action and until the further order of this court, and seeking a temporary restraining order restraining the defendants from any of the acts aforesaid until the application for a temporary injunction is heard and passed upon by this court, and good cause appearing therefor, and the plaintiffs having given security in the sum of $1000.00 for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained, the security being in such sum as the court deems proper.

It is ordered that said application for a temporary injunction be and the same hereby is set for hearing on the 2nd day of July, 1952, at the hour of 10:00 o'clock A.M., in the courtroom of The Honorable Louis E. Goodman, District Judge, Post Office Building, City and County of San Francisco, State of California, at which time and place the defendants shall appear and show cause why said temporary injunction should not be granted.

It is further ordered that notice of said hearing shall be given by mailing a copy of this order to the defendants, the Attorney General of the United States, the United States

Attorney for the Northern District of California, and the Governor of the State of California, at least five days before said date of hearing, in accordance with 28 USCA, Section 2284.

It is further ordered that a temporary restraining order is hereby made restraining the defendants from any of the acts aforesaid until the application for a temporary injunction is heard and passed upon by this court.

The reasons for the issuance of said restraining order for the injury which plaintiffs will suffer if said temporary restraining order were not granted, and why such injury [fol. 13] would be irreparable, and why the order was granted without notice, are that unless granted the said defendants will bring numerous suits and proceedings against the plaintiffs and will impose excessive, unreasonable, arbitrary and oppressive penalties on plaintiffs, and impose an unreasonable burden on commerce, and if such proceedings should be instituted plaintiffs would be confronted with a large number of actions in different courts and would be compelled to pay the expense of defending the same. The Court specifically finds, based upon evidence submitted to the Judge to whom this application is presented, namely the verified bill of complaint, that such specified irreparable damage will result if this order is not granted.

Dated this 25th day of June, 1952.

Louis E. Goodman, District Judge.

[fol. 14] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO COMPLAINT—filed June 27, 1952

Now comes the plaintiffs in the above-entitled action and, under their right to amend once as of course, hereby amend Paragraph X of the complaint in the above-entitled action so as to read as follows:

X

Said plaintiffs allege that the claims and assertions [fol. 15] of the said defendants are without foundation, and said plaintiff United Air Lines, Inc. has not incurred any of said alleged penalties: First, because Congress has exercised jurisdiction and control and preempted the entire field of regulation of said route, and said route is in no way subject to the regulation and control of said defendants; and, second, that air carriers are not within the purview of the provisions of the Public Utilities Act of California imposing said penalties; and, third, if those penalties are in any way applicable they are excessive, unreasonable, arbitrary, and oppressive, and impose an unreasonable burden on interstate and foreign commerce, and said penalties and the Acts of the legislature of the State of California imposing the same amount to a taking of property of plaintiffs without due process of law, and constitute a denial to plaintiffs of the equal protection of the laws—all in violation of the Fourteenth Amendment to the Constitution of the United States.

Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, Mayer, Meyer, Austrian & Platt, John T. Lorch, Attorneys for Plaintiffs.

PROOF OF SERVICE

(Omitted in printing)

[fol. 16] *Duly sworn to by Edward F. Treadwell. Jurat omitted in printing.*

[fol. 17] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—filed July 2, 1952

The defendants Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell,

Members of and Collectively Constituting the Public Utilities Commission of the State of California, Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California, move the Court as follows:

[fol. 18] 1. To dismiss the action on the ground that the Court lacks jurisdiction of the subject matter of the action for the reason that there exists an adequate remedy in the Courts of the State of California for the purpose of reviewing any action that may be taken by the Public Utilities Commission of the State of California or its attorneys or representatives to enforce any penalties that may be provided by the laws of the State of California, or to enforce compliance with any order of said Public Utilities Commission pertaining to the subject matter of the above-entitled action.

2. To dismiss the action on the ground that the plaintiffs have not exhausted their administrative remedy which is available to them for the purpose of correcting any erroneous order that may be issued by said Public Utilities Commission pertaining to the subject matter of the above-entitled action.

3. To dismiss the action on the ground that the Court lacks jurisdiction of the subject matter of the action for the reason that Congress, in enacting the Civil Aeronautics Act of 1938 (49 U.S.C.A. Sections 401-705) has not so occupied nor preempted the field of jurisdiction over air transportation from a point in a state of the United States over territorial waters to another point in the same state as to preclude the exercise of jurisdiction over such transportation by such state of the United States.

(S.) Everett C. McKeage, J. Thomason Phelps, Attorneys for Defendants Public Utilities Commission of the State of California, Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California, 514 State Building, San Francisco 2, Calif.

[fol. 19] NOTICE OF MOTION

(Omitted in printing)

[fol. 20] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

ORDER DESIGNATING UNITED STATES CIRCUIT JUDGE AND UNITED STATES DISTRICT JUDGES PURSUANT TO SECTION 2284 OF 28 UNITED STATES CODE—filed July 15, 1952

Whereas, in my judgment the public interest so requires, I, pursuant to the provisions of Section 2284, Title 28, United States Code, do hereby designate and appoint the

Honorable William E. Orr, United States Circuit Judge for the Ninth Judicial Circuit, and the

Honorable Edward P. Murphy, United States District Judge for the Northern District of California, to wit with the

Honorable Louis E. Goodman, United States District Judge for the Northern District of California, and to hold the District Court for the Northern District of California and to hear and determine the following cause: United Air Lines, Inc., et al. v. Public Utilities Commission of the State of California, et al., No. 31,638, and all motions and proceedings therein.

Dated at San Francisco, California, this 15th day of July, 1952.

Clifton Mathews, Acting Chief Judge, United States Court of Appeals, Ninth Judicial Circuit.

[fol. 21] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR LEAVE TO INTERVENE—filed August 1, 1952

The Civil Aeronautics Board, an agency of the United States, moves the Court for leave to intervene as a

plaintiff in this action under Rule 24(b) of the Rules of Civil Procedure and to file the annexed complaint in intervention herein, upon the grounds, as fully disclosed by the annexed complaint, that (1) plaintiffs rely for ground of claim upon the provisions of the Civil Aeronautics Act of 1938 (49 U.S.C. 401, *et seq.*) administered by the Board, and upon various orders issued and actions taken by the Board under authority of said Act; and (2) the Board's claim and the principal action herein have questions of law and fact in common.

Chauncey Tramutolo, United States Attorney for the Northern District of California; Charles Elmer Collett, Assistant United States Attorney for the Northern District of California; James E. Kilday, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.; Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board, Washington 25, D. C., Attorneys for the Civil Aeronautics Board.

[fol. 22] NOTICE OF MOTION

(Omitted in printing)

[fol. 23] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS —filed August 8, 1952

I

In support of the first ground for their motion to dismiss, these defendants rely upon a decison of the Supreme Court of the United States in the cases of *Alabama Public Service Commission* v. *Southern Railway*, 341 U.S. 363, 365-366, 95 L. ed. 1016, 1019 and *Alabama Public Service*

Commission v. *Southern Railway*, 341 U.S. 341, 350-351, 95 L. ed. 1002-1009.

[fol. 24] II

In support of the second ground for their motion to dismiss, these defendants submit that the plaintiffs are bound to exhaust the administrative remedies available to them as a condition precedent to seeking judicial relief.

Federal Power Commission v. *Arkansas Power and Light Company*, 330 U.S. 802-803, 91 L. ed. 1261-1262.

Myers v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50-51, 82 L. ed. 638, 644.

Macauley v. *Waterman S.S. Corporation*, 327 U.S. 540, 544, 90 L. ed. 839, 842.

Rochester Telephone Corporation v. *United States*, 307 U.S. 125, 130, 83 L. ed. 1147, 1152.

To the extent, therefore, if at all, that the complaint in this action seeks injunctive relief against any action that might be taken by the defendant Public Utilities Commission in the exercise of the Commission's administrative powers, as distinguished from the commencement of actions for penalties in the courts of the State of California, the plaintiffs have not exhausted the administrative remedy available to them to correct any error in the exercise of such administrative powers.

So far as penalty actions may be concerned, this Court will take judicial notice of the fact that the Commission has authority to institute penalty actions only in the Superior Court of the State of California. Thus, any penalty action brought will be subject to judicial review at the very outset. It is an elementary rule that penalty statutes, although they impose very heavy penalties, are valid where ample opportunity is provided for judicial review.

Wadley Southern Railway Co. v. *Georgia*, 235 U.S. 651, 667-670, 59 L. ed. 405, 414.

In the *Wadley* case, a penalty statute of the State of [fol. 25] Georgia was involved which assessed a penalty as high as $5,000 a day. The Supreme Court of the United

States held that such statute was valid where full opportunity for judicial review is presented. In that case the penalty was assessed for the violation by the railroad company of an order of the Public Service Commission of the State of Georgia. The Court pointed out that the railroad company had an adequate opportunity to seek judicial review of the order of the Commission, but did not do so. The principle here involved is the same. It would make no difference whether the penalty action be brought for direct violation of the statute or brought for a violation of an order of the Public Utilities Commission which was made pursuant to the statute.

In light of this principle, we point out that it is the rule that a criminal prosecution in a State court will not be restrained by a Federal court because of the claim that such prosecution is unlawful, for the reason that there must be a showing, in addition, that such criminal prosecution will cause *irreparable injury.*

Beal v. *Missouri Pacific Rr. Corporation,* 312 U.S. 45, 49-52, 85 L. ed. 577, 579-580.

Obviously, the filing of a penalty action against these plaintiffs for the air carrier operation herein involved could not result in irreparable injury to these plaintiffs for two reasons: (1) that the courts of the State of California and the Supreme Court of the United States are open to the plaintiffs for review of any claimed infringement of their constitutional rights by the institution against them of a penalty action; and (2) one penalty action filed against the plaintiffs could not constitute irreparable injury. It is only where suits of such great number are to be filed that such action would constitute oppression that irreparable injury may be claimed.

[fol. 26] And finally, on this point we cite the case of *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, 598-599, 94 L. ed. 1088, 1093, which holds that the action taken by an administrative agency may well result in serious injury to a party, but that fact is not sufficient to justify a court in asserting jurisdiction. The administrative remedies must first be exhausted. But we wish to repeat that so far as penalty actions are concerned, they may be prosecuted

only in the Superior Court of California, where the plaintiffs will have adequate judicial protection. In this connection, the attention of this Court is called to the provisions of Sections 2101-2113 of the Public Utilities Code of California.

III

In support of the third ground of their motion to dismiss, these defendants submit that the Supreme Court of California and the Supreme Court of the United States have recently determined that the Public Utilities Commission of California has jurisdiction over the intrastate rates and charges of air carriers even though such carriers be engaged also in interstate commerce. The holding is that the Federal authority has not occupied the field of intrastate air transportation.

> *United Air Lines, Inc., et al.* (Decision No. 45624 in Case No. 5271, rendered April 24, 1951, by the Public Utilities Commission of the State of California, 50 Cal. P.U.C. 563. Decision of Commission affirmed by California Supreme Court without opinion (37 A.C. 633) and appeal dismissed by Supreme Court of the United States without opinion. (October Term 1951, U.S. No. 464, 96 L. ed. Adv. Ops. 228).)

The denial of review by the California Supreme Court of a decision of the California Public Utilities Commission is, in legal effect, an affirmance of the decision.

> *So. California Edison Company* v. *Railroad Commission*, 6 Cal. (2d) 737, 747; *Napa Valley Electric Company* v. *Railroad Commission*, 251 U.S. 366, 371-373, 64 L. ed. 310, 313; *So. Pac. Co.* v. *Van Hoosear* (Ct. of Appeals, 9th Cir.) 72 Fed. (2d) 903, 905.

[fol. 27] In the Civil Aeronautics Act (49 USCA 401 (21) (a))Congress defined "interstate air transportation" so as to include "the carriage by aircraft of persons or property as a common carrier for compensation or hire . . . in commerce between . . . places in the same State of the United

States through the air space over any place outside thereof."

We understand the reason for this inclusion to be that it was intended to cover situations arising on the Canadian and Mexican borders and where two or more State borders are involved. Obviously, uniformity of regulation would be desirable in such cases. However, the case where neither a foreign State nor two or more States of the Union are involved presents no situation coming within the reason of the rule justifying complete occupation of the field of air transportation by the Federal authority. Where the reason for the rule ceases, so should the rule.

One of the strongest presumptions known to the law is that Federal authority has not superseded State authority because the superseding of State authority by the Federal government strikes at that delicate balance between Federal and State jurisdictions upon which our Federal form of government is based. The superseding of State authority will be declared only where there is no possible doubt as to the clear intent of the Congress to so supersede State authority. Furthermore, it must clearly appear that the Federal invasion of State authority is necessary. Nothing must be left to inference or presumption. A Congressional act, in order to supersede State authority in the intrastate field, must be clear and susceptible of only one interpretation and that is that the clear intent of the Congress is to supersede State authority. (*Palmer* v. *Massachusetts*, 308 U.S. 79, 82-85, 84 L. ed. 93, 96-99; *Yonkers* v. *United States*, 320 U.S. 685, 690-691, 88 L. ed. 400, 403-405; *North Carolina* v. *United States*, 325 U.S. 507, 511, 89 L. ed. [fol. 28] 1760, 1765; *Alabama Public Service Commission* v. *Southern Ry.*, 95 L. ed. (adv. ops.) 708, 711.) Any doubt that may exist as to the superseding of State jurisdiction must be resolved in favor of State authority. (*Arkansas R.R. Commission* v. *Chicago, Rock Island & Pac. R.R. Co.*, 274 U.S. 597, 603, 71 L. ed. 1224, 1228.)

A reading of the Civil Aeronautics Act clearly shows that the Congress did not occupy the intrastate field of air transportation and had no intention of doing so so far as eco-

nomic regulation of air carriers is concerned. That Act makes no attempt to regulate rates and charges of air carriers in intrastate commerce. Some confusion arises because the Act apparently attempts to completely occupy the intrastate field from the standpoint of safety of operations of air carriers. But the Congress was meticulously careful to exempt economic regulation of intrastate air transportation from Federal regulation.

The legal rule concerning occupation of field of regulation by the Federal authority as applied to intrastate commerce applies equally to a situation involving intrastate commerce of a local nature where the Federal authority has not occupied completely the interstate field in question. The Supreme Court of the United States has pointed out on many occasions that, as applied to interstate commerce of a local nature, State jurisdiction thereover will not be held to have been superseded by the Federal authority unless the action of the Congress is clear and unmistakable and is irreconcilable with the exercise of State authority. (*Kelly* v. *Washington*, 302 U.S. 1, 9-15, 82 L. ed. 3, 10-13.)

The Supreme Court of the United States has further held that "In the absence of Federal regulation, State regulation is required in the public interest." (*Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 333, 95 L. ed. (adv. ops.) 673, 676.)

[fol. 29] In the case of *Fisheries Case* (*United Kingdom* v. *Norway*), Judgment of December 18, 1951, International Court of Justice Reports 1951, p. 116, involving a dispute between Great Britain and Norway concerning the territorial waters of the latter, it was held by the International Court of Justice that waters lying between the mainland of Norway and the chain of islands screening its western shoreline are territorial waters. The principle of this case compels the conclusion that the territory between the California coast and Catalina Island belongs to the United States and does not belong to a State other than California. It follows that, for internal and domestic purposes, this territory is within the jurisdiction of the State of California. At least it cannot be said to be outside the State of California.

The Supreme Court of the United States has held that the operation of a common carrier vessel between San Pedro, California, and Catalina Island is a matter of such local nature that the Public Utilities Commission of California has jurisdiction thereover.

Wilmington Transportation Co. v. *Railroad Commission*, 236 U.S. 151, 156, 59 L. ed. 508, 517.

The Court pointed out that Catalina Island is a part of California and is a part of no other State. While it is true that the decision makes some reference to the high seas, the question decided was that such operation is one of a local nature peculiarly within the jurisdiction of the State of California. If that particular field of operation, lawfully, may be occupied by the Federal government, we point out that, under the authorities heretofore cited, the act of the Congress undertaking to occupy the field in question must be clear and unambiguous and susceptible of no other interpretation than that State regulation is ir-
[fol. 30] reconcilable with the exercise of Federal authority.

Respectfully submitted, (S.) Everett C. McKeage, J. Thomason Phelps, Attorneys for Defendants Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California, 514 State Building, San Francisco 2, Calif.

Dated: August 6, 1952.

[fol. 31] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION TO DISMISS AND OTHER ORDERS—filed August 12, 1952

The motion of the defendant Public Utilities Commission of the State of California, and its Members, to dismiss the cause is denied.

The motion of defendant Edmond G. Brown, Attorney General of the State of California, to dismiss the action as to him is granted.

The petition of the Civil Aeronautics Board to intervene is granted, and the Intervener's complaint, tendered with its motion, is ordered filed herein.

Defendants are allowed ten (10) days from date hereof in which to answer the complaints.

Inasmuch as counsel have stipulated that the cause may be heard upon its merits rather than upon the application [fol. 32] for *for* preliminary injunction, the cause is set for hearing on the merits on Friday, August 29, 1952 at 10 a.m. The temporary restraining order heretofore issued will continue in effect until decision is rendered on the merits.

Dated: August 12, 1952.

Wm. E. Orr, United States Circuit Judge; Louis E. Goodman, United States District Judge; Edward P. Murphy, United States District Judge.

[fol. 33] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 31638

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a corporation, Plaintiffs,

CIVIL AERONAUTICS BOARD, Intervenor,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Edmund G. Brown, Attorney General of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California, Defendants

INTERVENOR'S COMPLAINT—Filed August 13, 1952

For its complaint in intervention the Civil Aeronautics Board alleges as follows:

I

The plaintiffs are common carriers engaged in the transportation of persons and property by aircraft from the mainland of the State of California (Los Angeles-Wilmington-Long Beach) to Avalon, Santa Catalina Island, California, under authority of a certificate of public convenience and necessity issued by the Civil Aeronautics Board pursuant to the provisions of the Civil Aeronautics Act of 1938. Plaintiffs, in reliance upon the provisions of the Civil [fol. 34] Aeronautics Act, the aforesaid certificate and other orders issued and actions taken by the Board under said Act, request, among other things, declaratory and injunctive relief against threats by the defendant Public Utilities Commission of the State of California and its

members to cause the defendant legal advisers of the Commission to bring suit against the plaintiffs for the recovery of penalties alleged to be due under the laws of the State of California by reason of plaintiffs' failure to file tariffs with the Commission for operations between the mainland of California and Santa Catalina Island, and further request declaratory and injunctive relief against any and all other attempts by the defendants to regulate such operations.

II

This action arises under an act of the Congress of the United States regulating commerce (Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U.S.C. 401, *et seq.*) as to which this Court has jurisdiction under 28 U.S.C. 1337, and under the Constitution and laws of the United States as to which this Court has jurisdiction under 28 U.S.C. 1331. The Court also has jurisdiction of intervenor's claim under 28 U.S.C. 1345.

III

The Civil Aeronautics Board is an agency of the United States created by and charged with responsibility, among other things, for the administration and enforcement of the economic regulatory provisions of the Civil Aeronautics Act of 1938. That Act provides for detailed and comprehensive regulation by the Board of air transportation as defined therein, and of air carriers engaged in such air transportation. The Board is empowered to issue certificates of public convenience and necessity authorizing air carriers to engage, *inter alia*, in interstate air transporta- [fol. 35] tion (49 U.S.C. 401(2), 401(21), 481). Tariffs for such interstate air transportation must be filed with the Board and observed by air carriers (49 U.S.C. 483), and rates and practices in interstate air transportation may be prescribed by the Board (49 U.S.C. 484, 491, 642). Service may be suspended or terminated only by leave of the Board (49 U.S.C. 481(k)), and adequate service may be compelled of air carriers with respect to interstate air transportation (49 U.S.C. 484, 642). Contracts between carriers relating to interstate air transportation must be

filed with the Board for its approval or disapproval (49 U.S.C. 488, 492). Interstate air transportation is defined by the Civil Aeronautics Act to include, among other things, "the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce between * * * places in the same State of the United States through the air space over any place outside thereof" (49 U.S.C. 401(21) (a)).

IV

Santa Catalina Island, a part of the State of California, is located approximately 30 miles from the mainland of California along the route operated by the plaintiffs, and approximately 22 miles from the nearest portion of the mainland. Plaintiffs' common carrier operations by aircraft between the mainland of California and Santa Catalina Island require flights of aircraft over waters which are outside of the boundaries and territorial jurisdiction of the State of California, and such operations constitute interstate air transportation as defined by the Civil Aeronautics Act.

V

Pursuant to and in accordance with the provisions of the Civil Aeronautics Act, the Civil Aeronautics Board on October 13, 1939 issued to the plaintiff Catalina Air Transport a certificate of public convenience and necessity which, as amended, authorizes that carrier to engage in the air [fol. 36] transportation of persons and property between Los Angeles, California and Avalon, Santa Catalina Island, California, via the intermediate point Wilmington-Long Beach, subject to the restriction that persons and property be transported between Los Angeles and Long Beach only on through flights to and from Avalon (1 Civil Aeronautics Authority Reports 431 (1939), 2 Civil Aeronautics Board Reports 798 (1941)). On July 23, 1942, the Board authorized a suspension of operations which continued for the duration of World War II (see 6 Civil Aeronautics Board Reports 1041, 1043 (1946)). Thereafter, on June 3, 1946, the Board approved a contract between the plaintiffs whereby United Air Lines was and is authorized to operate

the route on behalf of Catalina Air Transport (*ibid*). During all periods of operations, tariffs and other required documents and reports have been filed with the Board, and operations have been conducted under the regulatory supervision and jurisdiction of the Board.

VI

Upon information and belief, the defendant Public Utilities Commission of the State of California and its members have informed the plaintiffs that their said route and operations between Santa Catalina Island and the mainland of California are entirely within the regulatory control and jurisdiction of the said Commission; and that all rates, fares, and charges therefor must be filed with the Commission; and have threatened to direct the defendant legal advisers of said Commission to bring suit to recover penalties for the failure of the plaintiffs to file tariffs with the Commission and otherwise intend by the institution of proceedings before the Commission and the Courts to undertake to exercise regulatory control over said route and operations.

[fol. 37]

VII

The provisions of the Civil Aeronautics Act heretofore cited confer exclusive regulatory jurisdiction in the Civil Aeronautics Board over the plaintiffs' operations between Santa Catalina Island and the mainland of California, and the Board has exercised and is exercising such exclusive jurisdiction. The attempts by the defendants to assume regulatory control over said operations constitute an unlawful interference with interstate commerce and unlawfully interfere with the jurisdiction and functions of the Civil Aeronautics Board.

Wherefore, the Civil Aeronautics Board prays:

1. That it be adjudged and declared that the United States, by the Civil Aeronautics Act and by the actions of the Civil Aeronautics Board thereunder, has assumed complete control and regulation of the plaintiffs' route and operations between Santa Catalina Island and the mainland

of California and that defendants have no control or power of regulation over said route and operations;

2. That a writ of injunction issue out of this Court enjoining and restraining defendants from instituting any action or proceeding for the enforcement or collection of any penalties against the plaintiffs or otherwise for the purpose of asserting regulatory control over the plaintiffs in the conduct of their operations over the route described;

3. That a temporary injunction be granted enjoining defendants from any of the acts aforesaid during the [fol. 38] pendency of this action and until the further order of the Court; and

4. That the Court grant such other and further relief as may appear just and proper in the circumstances.

Chauncey Tramutolo, United States Attorney for the Northern District of California; Charles Elmer Collett, Assistant United States Attorney for the Northern District of California; James E. Kilday, Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.; Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board, Washington 25, D. C., Attorneys for the Civil Aeronautics Board.

[fol. 39] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANTS PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, AND PETER E. MITCHELL, MEMBERS OF AND COLLECTIVELY CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; EVERETT C. MCKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY AND J. THOMASON PHELPS—filed August 22, 1952

[fol. 46] The above-named defendants (hereinafter called "defendants") hereby answer plaintiffs' amended Complaint as follows:

I

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph I of the Complaint.

II

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph II of the Complaint.

III

Defendants admit the allegations contained in Paragraph III of the Complaint.

IV

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of the Complaint.

V

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V, except that defendants are informed and believe that plaintiff United Air Lines, Inc., has conducted operations between Los Angeles, in the State of California, and Avalon, Santa Catalina Island, in the State of California, via Wilmington-Long Beach, in the State of California.

VI

Defendants admit that "said route commences at Los Angeles, in the State of California, and continues via Wilmington-Long Beach, in the State of California", deny that said route continues "to the offshore boundary of the State of California", deny that said route "continues over the high seas and outside the boundaries and territorial jurisdiction of the State of California for a distance of about twenty-four miles", and admit [fol. 41] that said route terminates at "Avalon on Santa Catalina Island, which is likewise within the State of California".

Further answering Paragraph VI of the Complaint, defendants allege, upon information and belief, that the distance between the mainland of California and the shores of Santa Catalina Island is approximately thirty miles.

VII

Defendants make no answer to the conclusions of law set out in Paragraph VII of the Complaint, deeming that no answer thereto in a pleading is necessary.

VIII

Defendants make no answer to the conclusions of law contained in Paragraph VIII of the Complaint, deeming that no answer thereto in a pleading is necessary.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that "at all times herein mentioned said tariffs have been so filed, posted and published", appearing at lines 26-28 of page 4 of the Complaint, and the allegation that "at all times herein mentioned all said rates, fares and charges pertaining to said route have accordingly been filed with the Civil Aeronautics Board", commencing at line 31 of page 4 of the Complaint and terminating on line 2 of page 5 thereof.

Defendants admit that no rates, fares or charges pertaining to said route have been filed with the defendant Public Utilities Commission of the State of California.

IX

Defendants admit the allegation that "the said Public Utilities Commission now claims and asserts" that "all of the rates, fares and charges on said route must be filed with the said Public Utilities Commission", and deny the other allegations contained in Paragraph IX of the Complaint.

[fol. 42]

X

Defendants make no answer to the conclusions of law contained in Paragraph X of the Complaint, as amended, deeming that no answer thereto in a pleading is necessary,

and deny that any of the defendants have made any "claims and assertions" of the kind referred to in said Paragraph X, except the claim and assertion alleged in Paragraph IX of the Complaint and admitted in Paragraph IX hereof.

XI

Defendants deny the allegations of fact contained in Paragraph XI of the Complaint, and make no answer to the conclusions of law contained therein, deeming that no answer thereto in a pleading is necessary.

XII

Defendants make no answer to the conclusions of law contained in Paragraph XII of the Complaint, deeming that no answer thereto in a pleading is necessary.

Defendants deny that any of them have "threatened acts" of any of the kinds described in the Complaint.

Defendants deny that any such acts "are an interference with and an obstruction to interstate and foreign commerce, and with the sovereign power of the Nation to control and regulate those who cross its borders."

Defendants deny that there is any "matter in controversy herein."

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that any such matter "exceeds the sum or value of $3,000, exclusive of interest and costs", the allegation that "the value of said certificate of convenience and necessity exceeds the value of $3,000", the allegation that "the right to enjoy the said rights under said certificate exceeds the sum of $3,000", the allegation that "the right to operate the said lines free of control of defendants exceeds the sum or value of $3,000", the allegation that "the sum or value of said penalties exceeds the sum or value of $3,000", and the allegation that said sums are "all exclusive of interest and costs."

[fol. 43] XIII

Defendants make no answer to the conclusions of law set out in Paragraph XIII of the Complaint, deeming that

no answer thereto in a pleading is necessary, and deny the allegations of fact contained in said paragraph.

XIV

Defendants make no answer to the conclusions of law set out in Paragraph XIV of the Complaint, deeming that no answer thereto in a pleading is necessary, and deny the allegations of fact contained in said paragraph.

XV

Defendants make no answer to the conclusions of law contained in Paragraph XV of the Complaint, deeming that no answer thereto in a pleading is necessary, and deny any allegation of fact contained in said paragraph.

XVI

Defendants make no answer to the conclusions of law contained in Paragraph XVI of the Complaint, deeming that no answer thereto in a pleading is necessary, and deny the allegations of fact contained in said paragraph.

Wherefore, defendants pray:

1. That the Court dismiss the Complaint, as amended, and render its judgment for the defendants.
2. That the Court award to the defendants their costs.

(S.) Everett C. McKeage, J. Thomason Phelps, Attorneys for Defendants Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California.

[fol. 44] AFFIDAVIT OF SERVICE BY MAIL

(Omitted in printing)

[fol. 45] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT PUBLIC UTILITIES COMMISSION AND OTHERS TO INTERVENOR'S COMPLAINT—filed October 17, 1952

The defendants Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Everett C. Mc-[fol. 46] Keage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps (hereinafter called defendants) hereby answer the intervenor's complaint as follows:

I

Answering paragraph I of the intervenor's complaint, the defendants admit that "the plaintiffs are common carriers engaged in the transportation of persons and property by aircraft from the mainland of the State of California (Los Angeles-Wilmington-Long Beach) to Avalon, Santa Catalina Island, California."

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that such transportation is performed "under authority of a certificate of public convenience and necessity issued by the Civil Aeronautics Board pursuant to the Civil Aeronautics Act of 1938."

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiffs rely upon certain alleged provisions of law, but admit that the plaintiffs request relief of the kind alleged in paragraph I of intervenor's complaint against alleged threats of the kind alleged in said paragraph. Defendants deny the making of any such threats by them or by any of them.

II

Defendants make no answer to the conclusions of law set out in paragraph II of the intervenor's complaint, deeming that no answer thereto in a pleading is necessary.

III

Defendants are informed and believe and therefore admit that the Civil Aeronautics Board is an agency of the United States created by the Civil Aeronautics Act of 1938.

Defendants make no answer to the conclusions of law set out in Paragraph III of the intervenor's complaint, deem-
[fol. 47] ing that no answer thereto in a pleading is necessary.

IV

Defendants admit that Santa Catalina Island is a part of the State of California. Defendants are informed and believe and therefore admit that Santa Catalina Island is located approximately 30 miles from the mainland of California. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation that such distance is "along the route operated by plaintiffs" and the allegation that Santa Catalina Island is located "approximately 22 miles from the nearest portion of the mainland."

Defendants admit that "plaintiffs' common carrier operations by aircraft between the mainland of California and Santa Catalina Island require flights of aircraft over waters," but deny that such waters "are outside of the boundaries and territorial jurisdiction of the State of California."

Defendants make no answer to the conclusion of law in paragraph IV of the intervenor's complaint that "such operations constitute interstate air transportation as defined by the Civil Aeronautics Act," deeming that no answer thereto in a pleading is necessary.

V

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V of intervenor's complaint.

VI

Defendants deny that "the defendant Public Utilities Commission of the State of California and its members have informed the plaintiffs that their said route and operations between Santa Catalina Island and the mainland of California are entirely within the regulatory control and jurisdiction of the said Commission," but admit that said Commission has informed the plain- [fol. 48] tiffs that "all rates, fares, and charges" for such transportation between Santa Catalina Island and the mainland of California "must be filed with said Commission."

Defendants deny that they or any of them "have threatened to direct the defendant legal advisors of said Commission to bring suit to recover penalties for the failure of the plaintiffs to file tariffs with the Commission," and deny that the defendants or any of them "intend, by the institution of proceedings before the Commission and the Courts, to undertake to exercise regulatory control over said route and operations," except such control over the rates and charges pertaining to said route and operations as may be finally determined to be justified after formal proceedings commenced by an order of the Commission instituting investigation into said route and operations.

VII

Defendants make no answer to the conclusions of law contained in paragraph VII of the intervenor's complaint, deeming that no answer thereto in a pleading is necessary, and deny that the defendants or any of them have attempted "to assume regulatory control over said operations."

Wherefore, defendants pray:

1) That the Court dismiss the intervenor's complaint and render its judgment for the defendants.

2) That the Court award costs to the defendants against the intervenor.

(S.) Everett C. McKeage, J. Thomason Phelps, Attorneys for Defendants Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps.

[fols. 49-50] AFFIDAVIT OF SERVICE BY MAIL

(Omitted in printing)

[fol. 51] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREED STATEMENT OF FACTS—filed November 21, 1952

In order to simplify the trial of the above-entitled action, and in order to lighten the burden of the Court, this stipulation is entered into in view of the approaching trial of the case on August 29, 1952, and the facts herein recited and set forth shall be deemed to be true, and shall stand in the [fol. 52] place of formal testimony and evidence:

1. That the plaintiff Catalina Air Transport is, and at all times mentioned in the complaint was, a corporation organized and incorporated under the laws of the State of California.

2. That the plaintiff United Air Lines, Inc. is, and at all

times mentioned in the complaint was, a corporation organized and incorporated under the laws of the State of Delaware and is a citizen resident of the State of Delaware.

3. Prior to October 13, 1939, Wilmington-Catalina Airline, Ltd. made an application to the Civil Aeronautics Authority for a Certificate of Public Convenience and Necessity with respect to the line described in the complaint, under the provisions of Section 401(e)(1) of the Civil Aeronautics Act of 1938.

4. On October 13, 1939, the Civil Aeronautics Authority made its order approving said petition and granting to said Wilmington-Catalina Airline, Ltd. a Certificate of Public Convenience and Necessity under said Act. Said order and opinion supporting it are published in 1 Civil Aeronautics Authority Reports, page 431. The Court may take judicial notice of said opinion and order without having a copy attached hereto.

5. Thereafter said Wilmington-Catalina Airline, Ltd. duly took such proceedings as were necessary to change its name to Catalina Air Transport. This change of name is shown in 2 Civil Aeronautics Board Reports, page 798. The Court may take judicial notice thereof without the same being attached hereto.

6. Thereafter, and on March 7, 1946, a contract in writing was entered into between the said Catalina Air Transport and United Air Lines, Inc. for the operation of said line by United Air Lines, Inc. Thereupon said United Air Lines, Inc. and Catalina Air Transport made an application to the Civil Aeronautics Board, under Sections 408(b) and 412(b) of said Civil Aeronautics [fol. 53] Act; and thereupon, on June 3, 1946, said Civil Aeronautics Board made its opinion and order approving said agreement on the condition that the supplemental oral agreement on passenger and air express rates entered into by Catalina and United shall be reduced to writing and filed with the Board for approval, under Section 412 of the Act, within 30 days of the approval of said order, and that this approval shall not extend to any other supplemental agreements which may hereafter be entered into pursuant to the terms of the two agreements approved. This opinion

and order are reported in 6 Civil Aeronautics Board Reports, page 1041. Said supplemental agreement was duly filed in accordance with said order.

7. None of the rates established by Catalina or United with respect to said route were ever filed with or approved by the Public Utilities Commission of the State of California.

8. In the year 1951 there was an exchange of correspondence over the question of the jurisdiction of said Commission and the duty of United to file its tariffs with said Commission, and the following letters were exchanged between representatives of United Air Lines, Inc. and the Public Utilities Commission, said letters being dated, respectively, August 6, 1951, September 10, 1951, September 20, 1951, October 11, 1951, November 6, 1951, November 30, 1951, December 5, 1951, and December 27, 1951. Copies of said letters are attached hereto, as Exhibit A, and made a part hereof.

9. The Commission now claims and asserts, and from time to time in the past has asserted that the said rates, fares and charges are entirely under the control and regulation of the said Public Utilities Commission, and that all of the rates, fares and charges on said route must be filed with the said Commission.

9A. The Public Utilities Commission asserts jurisdiction only over intrastate air transportation, and in this respect said Public Utilities Commission claims that the route between Wilmington, Calif. and Avalon on Santa Catalina Island, Calif. is an intrastate route.

10. Copies of certain of the documents referred to in [fol. 54] this stipulation may be attached hereto and if so attached shall be made a part of this stipulation and agreed statement.

11. It is further stipulated that the distance between the shoreline of the United States mainland and Santa Catalina Island is substantially 30 miles.

12. It is further stipulated that in agreeing to this statement of facts the parties do not waive the right to introduce testimony at the time of the hearing respecting mat-

ters not covered by said statement, or to supplement the facts therein stated.

Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, Mayer, Meyer, Austrian & Platt, John T. Lorch, Attorneys for Plaintiffs.

Everett C. McKeage, J. Thomason Phelps, Attorneys for Defendants.

We hereby approve and join in the foregoing statement of facts.

Chauncey Tramutolo, United States Attorney; Charles R. Collett, Asst. United States Attorney; Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board; O. D. Ozment, Attorney, Civil Aeronautics Board, Attorneys for the Civil Aeronautics Board.

[fol. 55] EXHIBITS A-1 THRU 10 TO AGREED STATEMENT OF FACTS

EXHIBIT A-1

Commissioners

Richard E. Mittelstaedt, President
Justus F. Craemer
Harold P. Huls
Kenneth Potter
Peter E. Mitchell

PUBLIC UTILITIES COMMISSION

State of California, August 6, 1951

California State Building, San Francisco 2, Calif.

Address All Communications to the Commission.

File No. 360-1.

Mr. W. Delaney Dilworth,
Traffic Manager,
United Air Lines, Inc.,
5959 South Cicero Avenue,
Chicago 38, Illinois.

Dear Mr. Dilworth:

We understand that the United Air Lines, Inc., is providing passenger transportation service by air for the pub-

lic generally between Long Beach and Avalon, Santa Catalina Island.

A review of our official files fails to indicate that the United Air Lines have a tariff on file with this Commission which sets forth the fares, rules and charges applicable to the aforementioned California intrastate traffic.

It is requested that you inform this office as to what action United Air Lines contemplates taking in this matter.

Yours very truly, (Sgd.) Warren K. Brown, Director of Transportation.

[fol. 56] EXHIBIT A-2

Letterhead of

UNITED AIR LINES

September 10, 1951

Mr. Warren K. Brown,
Director of Transportation,
Public Utilities Commission of
the State of California,

California State Building,
San Francisco 2, California.

Re: Your File No. 360-1

Dear Mr. Brown:

Thank you for your kind consideration in sending to me a copy of your letter of August 6, 1951.

With particular reference to that letter, United Air Lines, Inc. is providing air transportation for the carriage of persons and property between Los Angeles and Avalon and also between Long Beach and Avalon, in both directions.

We have on file with the Civil Aeronautics Board our tariffs covering the fares, rates and charges applicable to this service. Inasmuch as the Public Utilities Com-

mission of the State of California does not have jurisdiction over the regulation of this service, we have not filed a tariff with your Commission.

Very truly yours, W. Delaney Dilworth, Traffic Manager.

pss:ab.

cc: John T. Lorch, Esq., Oscar A. Trippett, Esq., Charles Stearns, Esq., Paul Hebard—EXORD.

[fol. 57] EXHIBIT A-3

Commissioners

Richard E. Mittelstaedt, President
Justus F. Craemer
Harold P. Huls
Kenneth Potter
Peter E. Mitchell

PUBLIC UTILITIES COMMISSION

State of California, September 20, 1951

California State Building, San Francisco 2, Calif.

File No. 360-1

Address All Communications to the Commission.
Mr. W. Delaney Dillworth,

Traffic Manager,
United Air Lines, Inc.
5959 South Cicero Avenue,
Chicago, Illinois.

Dear Mr. Dillworth:

It has been brought to the attention of this Commission that United Air Lines is performing air transportation between Los Angeles, California, and Avalon, on Santa Catalina Island, and also between Long Beach, California, and Avalon, without having filed with this Commission its

tariffs covering such transportation. It is our understanding that this operation is intrastate.

In your letter of September 10, 1951, to Mr. Brown, Director of Transportation of this Commission, you take the position that the Public Utilities Commission of California does not have jurisdiction over the service in question.

This is to inform you that this Commission does have jurisdiction over the service in question, it being intrastate, and the Supreme Court of this State has held that such service is subject to the jurisdiction of this Commission. Therefore, you are instructed to file with this Commission the tariffs covering the service in question.

Very truly yours, (Sgd.) R. J. Pajalich, Secretary.

[fol. 58] EXHIBIT A-4

Letterhead of

UNITED AIR LINES

October 11, 1951

Mr. R. J. Pajalich, Secretary,
Public Utilities Commission of
the State of California,

California State Building,
San Francisco 2, California.
Subject: Letter of September 20, 1951. File No. 360-1.

Dear Mr. Pajalich:

The matter of filing a tariff for our Catalina service with the Public Utilities Commission for the State of California was referred to our Law Department for their review. We have just been advised that their opinion will be available this week, and we plan to communicate with you as quickly as it is received.

Very truly yours, W. Delaney Dilworth, Traffic Manager.

LGB:hk.

[fol. 59] EXHIBIT A-5

Commissioners

Richard E. Mittelstaedt, President
Justus F. Craemer
Harold P. Huls
Kenneth Potter
Peter E. Mitchell

PUBLIC UTILITIES COMMISSION

State of California, November 6, 1951

California State Building, San Francisco 2, Calif.

File No. 360-1

Address All Communications to the Commission.

Dear Mr. Dillworth:
Traffic Manager,
United Air Lines, Inc.,
5959 South Cicero Avenue,
Chicago 38, Illinois.

Dear Mr. Dillworth:

This refers to our exchange of letters regarding the filing of a tariff covering your service to Santa Catalina Island. Under date of October 11 you wrote us to the effect that the opinion of your law department in this matter would be available that week and you would communicate with us when it was received.

Can you now inform us what position you propose taking in this matter?

Yours very truly, (Sgd.) Warren K. Brown, Director of Transportation.

[fol. 60] EXHIBIT A-6

November 30, 1951.

Mr. Warren K. Brown,
Director of Transportation,
Public Utilities Commission,
State of California,
California State Building,
San Francisco 2, California.

Re: File No. 360-1

Dear Mr. Brown:

This will acknowledge receipt of your letter of November 6, 1951, regarding our service to Santa Catalina Island.

This matter is now in the hands of our local counsel in Los Angeles and you will hear from them within the next few days.

Yours very truly, W. D. Dilworth, Traffic Manager.

THD:ru.

[fol. 61] EXHIBIT A-7 & 8

TRIPPET, NEWCOMER, YOAKUM & THOMAS

Lawyers

458 South Spring Street

Los Angeles 13, 5 December 1951

Air Mail

Wilson E. Cline, Esq.,
Assistant Counsel,
Public Utilities Commission,
State of California,
California State Building,
San Francisco 2, California.

Re: File No. 360-1 (United Air Lines, Inc.)

Dear Mr. Cline:

You probably are aware of the fact that rather extended correspondence has been exchanged between the Public

Utilities Commission and United with respect to that carrier's operation between Santa Catalina Island and the Los Angeles area. Such correspondence has been handled by Messrs. Brown and Pajalich on behalf of the Commission, and personnel in United's general office in Chicago. The question involved is whether or not United is required to file with your Commission tariffs covering the Catalina operation.

The matter has now been referred to us by our client for further handling, and since it concerns a question of law, it seemed appropriate to me that I should address this communication to you.

It is our position, of course, that United is not subject to the jurisdiction of your Commission with respect to transportation furnished by it between Catalina and the mainland, for all of the reasons which we have heretofore advanced in connection with the Los Angeles-San Francisco air coach fare matter now on appeal to the Supreme Court of the United States. There is present in the Catalina situation an additional factor which, in our opinion, serves to remove any possible doubt with respect to the [fol. 62] question. This is the fact that, while the termini of the route; i.e., Avalon and Long Beach-Los Angeles, are within the State of California, all but a small portion of the route traverses the high seas, an area which lies without the boundaries of the State of California (California Constitution Article XXI). Under such circumstance, the express language of the Civil Aeronautics Act establishes the fact of exclusive federal occupancy of the field of regulation (49 U.S.C. 401 (10), (20) and (21)). Ipso facto, this precludes the exercise of control by the State.

I trust that you will agree with the position taken by us, so that the problem may thereby be disposed of. In any event, I shall be pleased to hear from you on the matter.

Yours very truly, —— ——, of Trippet, Newcomer, Yoakum & Thomas.

CS/rg.

[fol. 63] EXHIBIT A-9 & 10

(Seal)

PUBLIC UTILITIES COMMISSION

State of California

California State Building, San Francisco 2, Calif.

December 27, 1951

File No. 360-1

Address all Communications to the Commission.

Mr. Charles Stearns, Esq.,
Trippet, Newcomer, Yoakum & Thomas,
458 South Spring Street,
Los Angeles, California.

Re: File No. 360-1 (United Air Lines, Inc.)

Dear Mr. Stearns:

Your letter of December 5 to Mr. Cline has been referred to this office for reply.

You, of course, are fully aware of the position which has been taken by the Commission with respect to intrastate fares of air carriers operating within the State of California, which position is now supported by decisions of the California Supreme Court.

You now contend that the route between Avalon and Long Beach-Los Angeles traverses the high seas and that state regulation is precluded by reason of the claimed exclusive Federal occupancy of this field of regulation. We have given the sections of the Civil Aeronautics Act to which you have referred us careful consideration. 49 U.S.C. 401 (20) is not applicable as it relates to "air commerce". We interpret 49 U.S.C. 401 (21) to define "interstate air transportation", "overseas air transportation", and "foreign air transportation" separately and not jointly.

Interstate air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage

of mail by aircraft in commerce between a place in any state of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or *between places in the same State of the United States through the air space over any place outside thereof;* or between places in the same Territory or possession of the United States, or the District of Columbia.

Overseas air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or posses- [fol. 64] sion of the United States, and a place in any other Territory or possession of the United States.

Foreign air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

The transportation of persons or property by air carrier between Avalon and Long Beach-Los Angeles is not interstate or foreign commerce in the general sense or in the Constitutional sense. See *Wilmington Transportation Company* v. *Railroad Commission,* (1913), 166 Cal. 741, affirmed (1915), 263 U S 151, 56 L. ed 508. Conceding for the sake of argument that such transportation is overseas transportation in the general sense, Congress has not seen fit to include such transportation within its own definition of "overseas air transportation." The language "or between places in the same State of the United States through the air space over any place outside thereof" as used in the definition of "interstate air transportation" undoubtedly applies to transportation between places in the same state where the aircraft has gone through the air space over some other state. Hence, the Congress has not occupied the field in so far as the local transportation by aircraft between Avalon and Long Beach-Los Angeles is concerned, and such transportation remains

subject to regulation pursuant to the applicable provisions of the California Constitution.

In view of our interpretation of the Civil Aeronautics Act and the California Constitution we again instruct your client United Air Lines, Inc., to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles.

Very truly yours, (S.) R. J. Pajalich, Secretary.

[fol. 65] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a corporation, Plaintiffs,

CIVIL AERONAUTICS BOARD, Intervenor,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al., Defendants

Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, 955 Mills Tower, San Francisco 4, Calif.; Mayer, Meyer, Austrian & Platt, John T. Lorch, 231 South LaSalle Street, Chicago 4, Illinois, Attorneys for Plaintiff.

Chauncey Tramutolo, United States Attorney; Charles Elmer Collett, Assistant United States Attorney, San Francisco, Calif.; James E. Kilday, Special Assistant to the Attorney General, Washington 25, D.C.; Emory T. Nunneley, Jr., General Counsel, Civil Aeronautics Board, Washington 25, D. C., Attorneys for Intervenor.

O. C. Ozment, Assistant to General Counsel, Civil Aeronautics Board.

Everett C. McKeage, Chief Counsel Public Utilities Commission, 514 State Building, San Francisco, Calif.; J. Thomason Phelps, 514 State Building, San Francisco, Calif., Attorneys for Defendants.

[fol. 66] Before: ORR, Circuit Judge; GOODMAN, District Judge; MURPHY, District Judge.

OPINION—Filed December 3, 1952

GOODMAN, District Judge:

On October 13, 1939, the Civil Aeronautics Board, pursuant to its power under the Civil Aeronautics Act (49 USC 401 et seq.), issued to the plaintiff, Catalina Air Transport, a certificate of public convenience and necessity authorizing it to engage in air transportation between Los Angeles-Wilmington-Long Beach, California, and Avalon on the island of Santa Catalina, (a part of the State of California) over the intervening high seas. Since March 7, 1946, plaintiff, United, with the approval of the Civil Aeronautics Board, has conducted air transportation over the described route and has performed the obligations of plaintiff, Catalina, under the latter's certificate of convenience and necessity. Plaintiff, Catalina, since 1939, and United, since 1946, have been subject, in all respects, including rates of transportation, to the regulations of the Civil Aeronautics Board. In September of 1951, defendant Public Utilities Commission of California advised United in writing that the Commission claimed jurisdiction over the Catalina route and therefore instructed United "to file with this Commission the tariffs covering the service in question." To this, United objected. But in December of 1951, it was again advised by the Commission in writing: "In view of our interpretation of the Civil Aeronautics Act and the California Constitution we again instruct . . . to file with this Commission the tariffs covering the service between Avalon and Long Beach." United and its predecessor, having been regulated by the Civil Aeronautics Board for twelve years as to the Avalon route, United thus found itself confronted with a sudden, belated and somewhat unexplained claim of state jurisdiction. [fol. 67] Being fearful of the consequences besetting a victim of conflicting jurisdictions, United filed this action.

The substance of plaintiff's complaint is that the United States, by the Civil Aeronautics Act of 1938, pre-empted the field of air commerce and transportation involved in

the described route of plaintiff; that federal authority is supreme and that the attempt to exercise jurisdiction by the California Public Utilities Commission would subject the plaintiff to irreparable damage. Declaratory relief is sought. As well, it is claimed that certain parts of the Public Utilities Act of California, under which the defendant Commission is authorized to function, are in violation of the Constitution of the United States.

At the beginning of the litigation, upon request of counsel for plaintiff, pursuant to 28 USC §§2281, 2284, a three judge court was appointed to hear and determine the cause. This was proper because the complaint sought to restrain enforcement of a state statute, inter alia, upon the alleged ground of its unconstitutionality. The court assembled. Heretofore it dismissed the action against defendent Brown, Attorney General of California, and granted Civil Aeronautics Board the right to intervene and allowed it to file a complaint as such intervenor. The cause has been heard upon the merits, upon the complaints of plaintiff and intervenor, and the answers of defendants to both complaints.

We do not reach nor decide the issue tendered, that the state statute is unconstitutional.[1] If the cause required the resolution of no other *federal issue*, obviously this court [fol. 68] could dissolve itself. See Bowles v. Case, 9 Cir.,

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[1] The Supreme Court has made the frequent admonition that federal courts should refrain from invalidating statutes on constitutional grounds when there are other adequate grounds for decision:

> "Hurd v. Hodge, 334 U. S. 24, 30, 68 S. Ct. 847, 92 L.Ed. 1187; Rescue Army v. Municipal Court, 1947, 331 U.S. 549 at page 569, 67 S.Ct. 1409, 91 L.Ed. 1666; Alma Motor Co. v. Timkin-Detroit Axle Co., 1946, 329 U.S. 129, 136, 67 S.Ct. 231, 91 L.Ed. 128; Arkansas Fuel Co. v. State of Louisiana ex rel. Muslow, 1938, 304 U.S. 197, 202, 58 S.Ct. 832, 82 L.Ed. 1287; Baker v. Grice, 1898, 169 U.S. 292, 18 S.Ct. 323, 42 L.Ed. 748.

There would appear to be no good reason why this doctrine should not apply to courts constituted as this one is. See Morgan v. U.S. 107 Fed. Supp. 501, at 504.

149 Fed. 2d 777; affirmed 327 U.S. 92; Ex parte Bransford, 310 U.S. 354; cf. Farmers Gin Co. v. Hayes, 54 Fed. Supp. 43. Penn. Greyhound Lines v. Board of P.U. Comrs. 107 Fed. Supp. 521.

But there are other adequate bases of federal jurisdiction. 28 USC 1331; 28 USC 1337; 28 USC 2201[2]. Such being the case, this Court, having properly acquired jurisdiction, has power to consider and dispose of all questions involved in the suit. Louisville & Nashville Railroad Co. v. Garrett, 231 U.S. 298; Freeman's Ins. Co. v. Beha D.C. 30 Fed. 2d 539; Fisher v. Brucker D.C. 41 Fed. 2d 774.

The Civil Aeronautics Act of 1938 defines interstate air transportation to mean "The carriage by aircraft of persons or property . . . between places in the same state of the United States through the air space over any place outside thereof."

The record here shows, by stipulation, that there is a distance of about 30 miles between the shore line of the United States and the Santa Catalina Island. We have no difficulty in finding, and so find, that a substantial portion of these 30 miles lies over the high seas and is not within the State of California. Hence it follows that air transportation through the air space thereover is over a place outside of the State of California.

The Congress, by the statute, assumed jurisdiction over this area. This it had the power to do. In this field it has supremacy. Since the Congress had the power to assert federal jurisdiction, the plain language of the statute compels the conclusion that the Public Utilities Commission of [fol. 69] the State of California has no jurisdiction or power to regulate in any manner the transportation activities of the plaintiff over the route in question.

Defendants urge that we should decline jurisdiction here in order to allow the state courts to finally adjudicate whether defendant Commission has jurisdiction. They cite the now-oft-quoted case of Alabama Public Service Commission v. Southern Railway Co. 341 U.S. 341. But

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[2] § 1337 gives jurisdiction irrespective of the amount in controversy. Even so, the evidence does sufficiently establish an amount in controversy in excess of $3000.

that case had to do with alleged constitutional improprieties in the enforcement of a state statute, which the Supreme Court said, federal courts should leave to the decision of state courts. Here the Court must appraise the reach of a federal statute when in conflict with state law. In that field it should assert and not forego its jurisdiction. Rice v. Santa Fe Elevator Corp. 331 U.S. 218. See also Cloverleaf Co. v. Patterson, 315 U.S. 169.

It is contended by the defendant Commission that the cause is not ripe enough for equitable relief. It admits that it has, in writing, claimed jurisdiction, but alleges that until the defendant Commission actually holds a hearing and formally seeks to embrace plaintiff, this action is premature. Upon the record here, we hold this contention to be without merit. Bethlehem Steel Corp. v. N.Y. State Labor Relations Board, 330 U.S. 767; Public Utilities Commission of Ohio v. United Fuel Gas Co. 317 U.S. 456; Penn. v. W. Va. 262 U.S. 553.

Plaintiff is entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiff in its operations in the described route and permanently forbidding and enjoining the defendants from, in any manner, interfering with such paramount jurisdiction.

Present findings and decree accordingly.

Dated: December 3, 1952.

[fol. 70] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY PLAINTIFFS

FINDINGS OF FACT—Filed January 12, 1953

1. All of paragraph 4 on pages 2 and 3 of plaintiffs' proposed findings, except the first sentence, is a recital of various statutory provisions of the Civil Aeronautics Act and is not a statement of findings of fact and should therefore be stricken.

2. The statement commencing on line 25 of paragraph 8 [fol. 71] on page 4 of plaintiffs' proposed findings "and operations were otherwise under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board" is a conclusion of law and not a finding of fact and should be stricken from the findings.

3. Likewise the statement commencing on line 15 (of paragraph 9 on page 5) of plaintiffs' proposed findings "and operations have been, and are being, otherwise conducted by United under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board" is also a conclusion of law and not a finding of fact and should be stricken.

4. The finding commencing on line 29 of paragraph 10 on page 5 of plaintiffs' proposed findings: "Subsequently, on February 27, 1952, the defendant Everett C. McKeage, Chief Counsel for the defendant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission" should be stricken. This statement is supported by testimony of Mr. Treadwell, but is not supported by the preponderance of the evidence. The statements of counsel for defendants and the testimony of Judge McKeage show that there was and is no intention on the part of the defendants to institute penalty actions against United by reason of its refusal to file tariffs covering its operations between Los Angeles-Wilmington-Long Beach and Avalon until after the jurisdictional question is finally settled and that they do not intend then to seek any penalties except those which accrue after a contumacious refusal on the part of United to comply with a final order of the Public Utilities Commission. (Reporter's Transcript pages 30-33, 38, 45, 47-49, 62-64.) Furthermore, it is a matter of record that the action was not filed by plaintiffs in this Federal District Court until June 25, 1952, almost four months after the conference of February 27, 1952. This would certainly indicate an absence of pressure on United rather than the threat of a penalty of $2,000 per day. (See Judge McKeage's testimony, Reporter's Transcript page 66.)

5. Paragraph 11 of plaintiffs' proposed findings does not set forth accurate findings of fact based upon the record and should be stricken. The following findings [fol. 72] should be substituted therefor:

"The defendants have never had any intention and now have no intention to institute proceedings against United for the recovery of penalties by reason of its refusal to file tariffs covering its operations between Los Angeles-Wilmington-Long Beach and Avalon unless and until such time as the Public Utilities Commission formally finds and declares that it has jurisdiction over the rates and charges in issue by a decision issued in a proceeding instituted before the Commission for the purpose of ascertaining jurisdiction, to which proceeding the plaintiff United Air Lines will be made a party, and then only after such decision has become final; and then defendants will seek only those penalties accruing after such final decision and after a contumacious refusal on the part of plaintiff air carrier to comply with orders set forth in such final decision. The defendants state that they will cause an investigation to be instituted before the Commission should this Court not resolve the jurisdictional dispute between the parties. The prior claims of jurisdiction were made by the Commission pursuant to the advice and recommendation of the Chief Counsel for the Commission, the defendant Everett C. McKeage, and he states that he will again advise the Commission in the proceeding which may be instituted by the Commission that the Commission has and should assert jurisdiction over the rates and charges of United in its operations between Los Angeles-Long Beach-Wilmington and Catalina, if the factual situation remains the same. The plaintiff air carriers will incur expenses in excess of $3,000 in defending themselves in any such proceeding before the defendant Commission."

6. We object to paragraph 12 on pages 6 and 7 of plaintiffs' proposed findings on the ground that this paragraph is not a complete and accurate statement of the facts in the record. A more complete and accurate statement of the facts referred to in said paragraph 12 is as follows:

"Statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that any public utility violates or fails to comply with any

provision of the Constitution of the State of California or of the Public Utilities Act or fails or neglects to comply [fol. 73] with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the Commission, in a case in which a penalty has not otherwise been provided. The defendants in the past have asserted that these statutory penalties are applicable to air carriers engaged in intrastate common carriage within the State of California and have caused proceedings to be instituted in the California Courts for the recovery of these penalties against various air carriers, including the defendant United, in other cases where such air carriers had tariffs of their rates and charges on file with this Commission and had collected rates and charges in excess of such filed tariffs, and then only after the Commission Decision No. 45624, 50 Cal. P.U.C. 563 (see Reporter's Transcript 20), in which the Commission had determined that it had regulatory jurisdiction over the intrastate rates and charges of air common carriers, had become final by reason of the California Supreme Court refusing to grant review of the decision and by reason of the United States Supreme Court dismissing the appeal from the California Supreme Court on the ground that no substantial federal question was involved.

7. The first sentence of paragraph 13 on page 7 of plaintiffs' proposed findings should be stricken because such finding is not supported by the preponderance of the evidence. Please refer to paragraph 4 above where we have discussed the evidence appearing in the record which relates to threat of seeking penalties.

The second sentence of said paragraph 13 should be stricken because the institution of such an investigation before the Commission being a lawful exercise of administrative authority would not constitute irreparable injury to plaintiffs.

A portion of the last sentence of said paragraph 13 reads as follows:

". . and these certain and possible expenditures may ultimately be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United." This finding

should be stricken because it is speculative and is not supported by evidence in the record.

[fol. 74] We propose that the following findings be substituted for paragraph 13 of plaintiffs' proposed findings:

"(1) We find that the letters from the Commission addressed to the plaintiff United directing it to file tariffs did not contain any threat express or implied or any risk that any of the defendants would institute penalty actions or contempt proceedings or request that criminal proceedings be instituted against United or any of its employees for refusal to file tariffs covering its Catalina operations with the Commission; (2) that none of the defendants verbally ever made any such threats; and (3) if any such threats were ever made or if any such risk ever existed, that defendants by statements of counsel and testimony of their witness have removed and dissolved such threats and risk.

"(4) We further find that the declared intention of the Commission to institute an investigation to determine whether it should order plaintiff United to file tariffs covering its Catalina operations and to determine whether it has jurisdiction to do so does not subject plaintiff to any risk of irreparable injury."

CONCLUSIONS OF LAW

We object to paragraph 4 on pages 8 and 9 of plaintiffs' proposed conclusions of law because the institution of any investigation into plaintiff United's operations would not result in irreparable injury to plaintiffs inasmuch as such investigation would constitute the lawful exercise of administrative authority. We further object to said paragraph 4 because proper findings by the Court would state that there is no threat of penalty actions being instituted by any of the defendants against plaintiffs by reason of plaintiff United's past and present refusal to file [fol. 75] tariffs with the Commission covering its Catalina operations.

Respectfully submitted this 12th day of January, 1953.

(S.) Everett C. McKeage, Chief Counsel; J. Thomason Phelps, Senior Counsel; Wilson E. Cline, Attorneys for Defendants, 514 State Building, San Francisco, California.

[fol. 76] IN UNITED STATES DISTRICT COURT

[Title omitted]

OBJECTIONS TO JUDGMENT PROPOSED BY PLAINTIFFS—January 12, 1953

1. We object to paragraph 1 on page 2 of the ordering portion of plaintiffs' proposed judgment because it is too broad in its scope. The only claim of jurisdiction by defendants is over the *rates and charges* of *plaintiff United* [fol. 77] *Air Lines, Inc.* The record does not show any claim of jurisdiction by defendants over any other aspect of United's Catalina operations, nor does it show any claim of jurisdiction over plaintiff Catalina Air Transport which is not presently operating. Further, defendants are entitled to have the route clearly described in the order.

We propose that said paragraph 1 should be revised to read as follows:

> "1. That the Civil Aeronautics Board has exclusive jurisdiction over the rates and charges of plaintiff United Air Lines, Inc., in connection with its operations over the route between the mainland of the United States, at Los Angeles-Wilmington-Long Beach, Los Angeles County, California, and Avalon on Santa Catalina Island, California."

2. For similar reasons paragraph 2 on pages 2 and 3 of the ordering portion of plaintiffs' proposed judgment should be revised to read as follows:

> "2. That the defendants and their employees, agents and attorneys, and all persons claiming by, through or under them, be and they hereby are permanently prohibited and enjoined from in any manner interfering with the paramount jurisdiction of the Civil Aeronautics Board over the rates and charges of plaintiff United Air Lines, Inc., in connection with its operations over the route between the mainland of the United States, at Los Angeles-Wilmington-Long Beach, Los Angeles County, California, and Avalon on Santa Catalina Island, California, or from in any way controlling

or regulating the rates and charges of plaintiff United Air Lines, Inc., in connection with its operations over said route."

[fol. 78] 3. The first sentence of paragraph 3 on page 3 of the ordering portion of plaintiffs' proposed judgment should be revised to include defendants as well as plaintiffs and intervenors as follows:

"The court has not by this decree passed upon or adjudged the constitutionality or validity of any acts of the Legislature of the State of California imposing penalties, nor has it passed upon the question as to whether air lines such as plaintiffs' come within the purview of said acts, and this judgment is without prejudice to any right of the plaintiffs or the intervenor or the defendants with regard thereto."

Respectfully submitted this 12th day of January, 1953. (S.) Everett C. McKeage, Chief Counsel; J. Thomason Phelps, Senior Counsel; Wilson E. Cline, Attorneys for Defendants, 514 State Building, San Francisco, California.

[fols. 79-80] AFFIDAVIT OF SERVICE BY MAIL

(Omitted in printing)

[fol. 81] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Findings of Fact and Conclusions of Law

FINDINGS OF FACT—Filed January 27, 1953

From the pleadings and evidence in the above-entitled action, the Court finds:

1. The plaintiff Catalina Air Transport is, and at all times mentioned herein was, a corporation organized and

incorporated under the laws of the State of California. [fol. 82] 2. The plaintiff United Air Lines, Inc., is, and at all times mentioned herein was, a corporation organized and incorporated under the laws of the State of Delaware and is and was a citizen resident of the State of Delaware.

3. The defendant Public Utilities Commission of the State of California is a regulatory Commission of the State of California; and the defendants Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, are members of said Commission and collectively constitute said Commission, and are citizens and residents of the State of California, and have and maintain the principal office of the Commission within the State of California and the district of this court. The defendants Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps are legal advisers of the said Public Utilities Commission, are citizens and residents of the State of California, and maintain their offices within the said principal office of the Public Utilities Commission.

4. The intervenor Civil Aeronautics Board is an agency of the United States created by and charged with responsibility for, among other things, the administration and enforcement of the economic regulatory provisions of the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. 401 *et seq.*) That Act empowers the Board to issue certificates of public convenience and necessity authorizing air carriers to engage in interstate air transportation (49 U.S.C. 401(2), 401(21), 481). Interstate air transportation is defined by the Civil Aeronautics Act to include "the carriage by aircraft of persons or property as a common carrier for compensation or hire—in commerce between—places in the same State of the United States through the air space over any place outside thereof" (49 U.S.C. 401(21)(a)). Tariffs for such interstate air transportation must be filed with the Board and observed by the [fol. 83] carrier (49 U.S.C. 483), and rates and practices in interstate air transportation may be prescribed by the Board (49 U.S.C. 484, 491, 642). Service may not be suspended or terminated except by leave of the Board (49 U.S.C. 481(k)), and contracts between air carriers re-

lating to interstate air transportation, including contracts whereby one carrier conducts operations on behalf of another, must be filed with the Board for its approval or disapproval (49 U.S.C. 488, 492).

5. Santa Catalina Island is an island located in the Pacific Ocean, and is a part of the State of California. The distance between the shorelines of the island and of the mainland of California is thirty miles.

6. On October 13, 1939, the Civil Aeronautics Authority, now known as the Civil Aeronautics Board, issued a certificate of public convenience and necessity to Wilmington-Catalina Airline, Ltd., the predecessor of the plaintiff Catalina Air Transport, authorizing the air transportation of persons and property between Wilmington, on the mainland of California, and Avalon, on Santa Catalina Island, California. This award was based upon findings that the boundaries of California did not extend beyond a distance of three miles from the shoreline of the mainland, and beyond a distance of three miles from the shoreline of Santa Catalina Island. Since aircraft flying between Avalon and Wilmington were required to fly over approximately 24 miles of water not within the boundaries of the State of California, the Board concluded that common carrier transportation by aircraft between these points constituted interstate air transportation as defined by the Civil Aeronautics Act. *Wilmington-Catalina Air, Grandfather certificate,* 1 Civil Aeronautics Authority Reports 431.

7. On July 22, 1941, the Civil Aeronautics Board extended the route of Wilmington-Catalina Airline, Ltd. to [fol. 84] Los Angeles, California, so that the carrier was then authorized to conduct operations between Los Angeles and Avalon, Santa Catalina Island, via the intermediate point Wilmington-Long Beach, California. At the same time, the Board reissued the certificate in its entirety to reflect the change of the carrier's name from Wilmington-Catalina Airline, Ltd., to Catalina Air Transport. *Catalina Air, Service to Catalina Island,* 2 Civil Aeronautics Board Reports 798. Such amended certificate has ever since continued in full force and effect.

8. Operations continuously were conducted by Wilmington-Catalina Airlines, Ltd. and by Catalina Air Transport

over the routes hereinbefore described in accordance with and pursuant to the certificates of public convenience and necessity issued by the Civil Aeronautics Board, from October 13, 1939 until the carrier's equipment was requisitioned by the United States Government for military purposes in 1942. On July 23, 1942, the Board authorized the carrier to suspend operations because of the mentioned equipment requisition. This authorized suspension of service continued for the duration of the war and thereafter until operations over the route were begun by the plaintiff United Air Lines, Inc. Tariffs for the carriage of persons and property were maintained on file with the Civil Aeronautics Board, and not with the defendant Public Utilities Commission during all periods of operation by Wilmington-Catalina Airlines, Ltd. and its successor Catalina Air Transport; and operations were otherwise conducted under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board. All such operations constituted common carriage by aircraft for compensation and hire.

9. On June 3, 1946, the Civil Aeronautics Board approved an operating contract between the plaintiff United Air Lines, Inc. and Catalina Air Transport, dated March 7, 1946, whereby it was agreed that United would perform and [fol. 85] discharge all of the obligations of Catalina Air Transport under its certificate of public convenience and necessity. United Air Lines, Operation of Catalina Air Transport, 6 Civil Aeronautics Board Reports 1041. Various supplemental agreements relating to the rates and fares to be charged to the public for the transportation provided by United subsequently were filed with and approved by the Board, together with various other agreements relating to miscellaneous details of the operation. Said operating contract, and the approval thereof by the Board, have been continuously in effect since the date of initial approval by the Board, and operations have been and are being conducted by United thereunder. Tariffs for the carriage of persons and property have been, and are, maintained on file by United with the Civil Aeronautics Board, and not with the defendant Public Utilities Commission, and operations have been, and are being, otherwise

conducted by United under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board. All such operations constituted, and constitute, common carriage by aircraft for compensation and hire.

10. On September 20, 1951, the defendant Public Utilities Commission advised United by letter that the Commission had jurisdiction as to the rates and charges for the operation in question, and directed United to file its tariffs therefor with the Commission. United objected, asserting that its operations were subject only to the control and jurisdiction of the Civil Aeronautics Board. Thereafter, on December 27, 1951, the Commission again advised United by letter that the Commission had jurisdiction over the Santa Catalina operations, and again directed United to file its tariffs with the Commission.

[fol. 86] 11. The defendants by their answers to the complaints herein and by their testimony disclaim any present intention to institute proceedings against United for the recovery of the said penalties unless and until such time as the Public Utilities Commission formally finds and declares that it has jurisdiction over the operations in issue in a proceeding instituted before the Commission for the purpose of ascertaining jurisdiction, to which proceeding the plaintiff air carriers will be made parties, and then only if United thereafter fails to file its tariffs with the Commission after having been formally ordered to do so. The defendants state that they will cause such a proceeding to be instituted before the Commission unless this Court resolves the jurisdictional dispute between the parties. The prior assertions of jurisdiction were made by the Commission pursuant to the advice and recommendation of the Chief Counsel for the Commission, the defendant Everett C. McKeage, and he states that he will again advise the Commission in the proceeding which will be instituted by the Commission that the Commission has and should assert jurisdiction over the operations here involved with respect to tariffs, rates and charges. The plaintiff carriers will incur expenses in excess of $3,000 in defending any such proceeding before the defendant Commission.

12. Statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day

that operations are conducted by carriers without effective tariffs being on file with the defendant Public Utilities Commission. The defendants in the past have asserted that these statutory penalties are applicable to air carriers, and have caused proceedings to be instituted in the California Courts for the recovery of these penalties against various air carriers, including the defendant [fol. 87] United, in other cases wherein disputes have existed concerning the regulatory jurisdiction of the defendant Public Utilities Commission.

13. The refusal of the plaintiff United to heretofore comply with the directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. Apart from these risks, United is confronted with the necessity for incurring the expenditures incident to defending a proceeding certain to be instituted before the defendant Commission unless this Court resolves the controversy presented. No provisions exist under which United may recover its expenditures from the defendants, and these certain and possible expenditures may ultimately be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United.

14. The Court has not in these findings made any findings as to the constitutionality of the Acts of the Legislature of the State of California imposing penalties referred to in the complaint, or the question as to whether such Acts are applicable to the plaintiffs as air carriers, for the reason that the same involve the constitutionality of state laws and a decision on said questions is not necessary to final determination of this controversy.

Conclusions of Law

Upon the basis of the foregoing findings, the Court concludes:

1. This Court has jurisdiction under 28 U.S.C. 1331 in that the amount in controversy exceeds $3,000, exclusive of [fol. 88] interests and costs, and the case arises under the Constitution (Article 1, Section 8) and laws of the United States (Civil Aeronautics Act of 1938, 49 U.S.C. 401, et seq.); under 28 U.S.C. 1337 in that the case arises under an Act of Congress regulating commerce (Civil Aeronautics Act of 1938, 49 U.S.C. 401 et seq.); and under 28 U.S.C. 2201 in that an actual controversy exists between the parties concerning the question of whether the plaintiff air carriers are to be regulated by the Public Utilities Commission of the State of California or by the Civil Aeronautics Board.

2. The Civil Aeronautics Board is entitled to seek and obtain a ruling as to its powers and jurisdiction as a plaintiff-intervenor in this case, and to obtain declaratory and injunctive relief against any interference by the defendants with its jurisdiction.

3. The complaint herein seeks, *inter alia*, to restrain the enforcement of a statute of the State of California upon the grounds that certain penalties provided therein which may be applicable to air carriers are so unreasonable and oppressive as to be in violation of the Fourteenth Amendment to the Constitution of the United States. A substantial question would have been presented as to the constitutionality of these penalty provisions, if reached, and the appointment of a three-judge Court pursuant to 28 U.S.C. 2281 and 2284 was appropriate and required for the purpose of enabling the Court to resolve all issues presented by the air carrier plaintiffs. Having properly acquired jurisdiction, this statutory three-judge Court has jurisdiction to consider and dispose of this case even though its disposition is on grounds other than those relating to the constitutional issue which necessitated the assembling of the Court.

4. The proceeding before the defendant Public Utilities Commission which the defendants, unless precluded by action of this Court, intend to institute against the plaintiff [fol. 89] air carriers will subject said air carriers, and possibly the public, to irreparable injury if the said Commission has no jurisdiction in the premises, and would constitute a burden on interstate commerce and an interference with the jurisdiction of the Civil Aeronautics Board. These factors, coupled with the risks and expenditures to which the plaintiffs may be subjected as a result of possible penalty actions, and the actual controversy which exists between the parties, are such as to entitle both the plaintiffs and the intervenor to declaratory relief, and injunctive relief against actions which the defendants might otherwise institute concerning a subject matter over which the defendant Commission and the State of California are hereinafter found to lack jurisdiction. Plaintiffs have no plain, speedy and efficient remedy in the Courts of the State of California, or otherwise, than by this action. Further, since the matter in issue concerns the reach of a Federal statute which conflicts with the claims of the defendants regarding state law, this Court should decide the issues tendered irrespective of the existence or adequacy of any state Court remedies.

5. Without reaching or considering the status of the waters of the three-mile marginal belts along the coastline of the mainland of the State of California, and surrounding Santa Catalina Island, as territorial waters of the State of California for regulatory purposes, we conclude and hold that the intervening waters between these marginal belts are wholly outside the territory and jurisdiction of the State of California, and that aircraft passing over these intervening waters are passing through air space over a place outside of the State of California.

6. Congress has power to regulate all phases of transportation between places in the same State when that transportation involves passage through or over territory or waters outside the State, and it has asserted that power in the field of air transportation through the adoption of the [fol. 90] Civil Aeronautics Act of 1938, and by declaring

therein that all such common carrier transportation by aircraft constitutes interstate air transportation. The Civil Aeronautics Act provides for complete and detailed regulation by the Civil Aeronautics Board over all phases of interstate air transportation, including rates and charges therefor, and the Board has regulated and is regulating all phases of plaintiffs' operations between Santa Catalina Island and the mainland of the State of California. Such operations by the plaintiff air carriers constitute interstate air transportation as defined by the said Act, and the powers conferred upon and exercised by the Board leave no room for State regulation of these operations.

7. The plaintiffs and the intervenors are entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiffs in their mentioned operations, and permanently forbidding and enjoining the defendants from, in any manner, interfering with such exclusive jurisdiction.

Dated this 27th day of January, 1953.

Wm. E. Orr, Circuit Judge; Louis E. Goodman, District Judge; Edward P. Murphy, District Judge.

[fol. 91] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

No. 31638

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a corporation, Plaintiffs,

CIVIL AERONAUTICS BOARD, Intervenor,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California, Defendants

Before: Hon. William E. Orr, Circuit Judge, Hon. Louis E. Goodman, District Judge, Hon. Edward P. Murphy, District Judge.

JUDGMENT—Filed January 27, 1953

In the above-entitled action the defendants Public Utilities Commission of the State of California, Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, Peter E. Mitchell, Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, appeared and answered by their attorneys, Hon. Everett [fol. 92] C. McKeage, Chief Counsel, and Mr. J. Thomason Phelps; the Civil Aeronautics Board, by leave of the court duly had and obtained, appeared and filed a complaint in intervention by their attorneys, Messrs. Chauncey Tramutolo, United States Attorney, Charles Elmer Collett, Assistant United States Attorney, James E. Kilday, Special Assistant to the Attorney General, Emory T. Nunneley, Jr., General Counsel, and O. D. Ozment, Assistant to General Counsel, and said defendants answered said complaint

in intervention. At the inception of said case the plaintiffs properly requested the submission thereof to a three-judge court, pursuant to the provisions of 28 USC Secs. 2281, 2284, for the reason that said action raised the question of the unconstitutionality, under the Fourteenth Amendment to the Constitution of the United States, of the acts of the Legislature of the State of California imposing penalties referred to in the complaint, and such a court was assembled, consisting of Hon. William E. Orr, Circuit Judge, Hon. Louis E. Goodman, District Judge, and Hon. Edward F. Murphy, District Judge. The cause came on regularly for trial on the 21st day of November, 1952, and evidence, both oral and documentary, was introduced, and said matter was argued by the parties and submitted to the court, and the court, being now fully advised in the premises and having filed herein its findings of fact and conclusions of law,

Now, therefore, by reason of the law and the findings aforesaid, it is by the court here ordered, adjudged, and decreed:

1. That the Civil Aeronautics Board has exclusive jurisdiction over the plaintiffs in their operations over the route described in the complaint, and the defendants have no jurisdiction or power of regulation over the same;

2. That the defendants and their employees, agents and attorneys, and all persons claiming by, through or under them, be and they hereby are permanently prohibited and [fol. 93] enjoined from in any manner interfering with such paramount jurisdiction of the Civil Aeronautics Board, or from in any way controlling or regulating said route;

3. The court has not by this decree passed upon or adjudged the constitutionality or validity of any Acts of the Legislature of the State of California imposing penalties, nor has it passed upon the question as to whether air lines such as plaintiffs' come within the purview of said Acts, and this judgment is without prejudice to any right of the plaintiffs or the intervenor with regard thereto. The reason that the court has not passed on such questions is the policy of the court not to pass upon the constitutionality or construction of state statutes, the constitutionality or con-

struction of which has not been passed upon by the courts of the state, where the same is not necessary to a determination of the controversy before the court, and the court finds that a decision on those questions is not necessary to the determination of the controversy here involved.

Dated this 27th day of January, 1953.

Wm. E. Orr, Circuit Judge; Louis E. Goodman, District Judge; Edward P. Murphy, District Judge.

Entered in civil docket January 28, 1953.

[fol. 94] In United States District Court

[Title omitted]

Notice of Entry of Decree and Judgment

To Messrs. Treadwell and Laughlin, Attys., 955 Mills Tower, San Francisco; Mr. Everett C. McKeage, Atty., 514 State Building, San Francisco; United States Attorney, PO Building, San Francisco.

You are hereby notified that on January 28, 1953 a Decree and Judgment was entered of record in this office in the above entitled case.

You are hereby notified that on —— a Notice of Appeal was filed by —— in the above entitled case. A copy of which is enclosed herewith.

C. W. Calbreath, Clerk, U. S. District Court.

mpb.

California, San Francisco, January 28, 1953.

[fol. 95] Notice of Hearing of Motion

(Omitted in printing)

[fol. 96] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR NEW TRIAL—Filed February 6, 1953

Now comes the defendants in the above-entitled cause, and move this Court for an order setting aside the findings and conclusions of law and judgment herein and granting a new trial of the above-entitled cause, for the following reasons:

1. Since the trial of this case the United States Supreme [fol. 97] Court has decided the case of *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, No. 44, October Term, 1952, —— U.S. ——, 97 L. ed. (Advance p. 176), 21 Law Week 4077, which decision is determinative of the law in favor of the defendants in the present case and contrary to the decision of this Court. The decision of the United States Supreme Court in the Wycoff case supports the contention of defendants that plaintiffs herein are entitled to no relief in the Federal District Court because there exists an adequate remedy in the courts of the State of California for the purpose of reviewing any action already taken or that may be taken by the defendants herein pertaining to the subject matter of the above-entitled action. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to the United States Supreme Court by direct appeal from a decision of a state court in favor of the validity of a state statute (or as in this case an order of the defendant Commission which is in law a statute)[1] where its validity

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[1] Grand Trunk Western Railway Co. v. Railroad Commission of Indiana, 221 U.S. 400 at 403, 55 L. ed. 786 at 787; Bluefield Water Works and Improvement Company v. Public Service Commission, 262 U.S. 679 at 683, 67 L. ed. 1176 at 1179; Pacific States Box and Basket Company v. White, 296 U.S. 176 at 185 to 186, 80 L. ed. 138 at 146.

is questioned on the ground of its being repugnant to the Constitution, treaties or laws of the United States.[2]

2. This Court has erroneously found and concluded that the letters dated September 20, 1951, and December 27, 1951, from the Secretary of the Commission instructing plaintiff United to file tariffs covering the service here in question are orders of the Commission which raise such a justiciable controversy and subject plaintiffs to such threats of irreparable injury as to entitle them to the relief granted by the judgment of this Court.

3. Although the said letters from the Secretary of the Commission when issued may have caused plaintiffs to as- [fol. 98] sume that a justiciable controversy had arisen and that they were subject to a threat of irreparable injury, this Court has erroneously found and concluded that defendants by statements of counsel and testimony of their witness (i.e., that such letters were not intended to be a final determination of the jurisdictional question by the Commission and that the defendants had no intention of requiring plaintiff United to comply with the instructions contained in said letters, as such, but only an intention of instituting an investigation and requiring plaintiffs prospectively to comply with the orders therein issued by the Commission which had become final) have not removed and dissolved such justiciable controversy and threat of irreparable injury.

4. If the said letters from the Secretary of the Commission are orders of the Commission and are not subject to interpretation and explanation by defendants as set forth in the preceding paragraph numbered (3), the plaintiff United has failed to exhaust its administrative remedies in that no petition for rehearing has been filed with the Commission and no petition for review has been filed with the Supreme Court of the State of California. Said plaintiff's failure to exhaust its administrative remedies precludes this Court from granting the relief requested by said plaintiff.

5. This Court has erroneously found and concluded that the declared intention of defendants to institute an investi-

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[2] 28 U.S.C.A. 1257 (2).

gation before the Commission for the purpose of ascertaining its jurisdiction over plaintiff United raises such a justiciable controversy and subjects plaintiffs to such threats of irreparable injury as to entitle them to the relief granted by the judgment of this Court.

6. This Court has erroneously found and concluded that a substantial portion of the waters between the California mainland and Santa Catalina Island are outside the State of California.

7. This Court has erroneously found and concluded that the air transportation service of plaintiffs in question is interstate commerce.

8. This Court has erroneously found and concluded that [fol. 99] Congress through the adoption of the Civil Aeronautics Act of 1938 has preempted the field of regulation of air transportation between places in the State of California when that transportation involves passage through the air space over the high seas.

9. If the letters dated September 20, 1951, and December 27, 1951, from the Secretary of the Commission to plaintiff United are orders of the Commission they are orders affecting intrastate rates and the Johnson Act precludes this Court from issuing an injunction restraining the enforcement of such orders.

10. The provisions of the Constitution of the State of California under which defendants claim jurisdiction over plaintiffs pertain only to rates, fares and charges. Defendants have never claimed jurisdiction over any other aspect of plaintiffs' Catalina operations. In so far as the judgment of this Court restrains defendants from asserting jurisdiction over matters other than rates, fares and charges of plaintiffs, it is not supported by the record and is in error.

This motion is based upon the evidence and all the files and records in this action.

Argument

I

The facts in the recent case of *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, No. 44, October Term,

1952, —— U.S. ——, 97 L. ed. (Advance p. 176), 21 Law Week 4077, have been summarized in the decision of the United States Court of Appeals from which the appeal was taken, 196 F (2) 252, as follows:

> "Wycoff Company, Inc., is a Utah corporation engaged in the transportation of property as a common carrier by motor vehicle. Its business consists of transporting motion picture films and news reels between various picture exchanges in Salt Lake City and between individual exhibitors, both within and without the State of Utah. It holds a certificate of convenience and necessity as to its interstate transportation from the Interstate Commerce Commission, but has refused to acknowledge the jurisdiction of the Public Service Commission of Utah as to its transportation activities beginning and ending wholly within the State of Utah. When the Public Service Commission of Utah sought [fol. 100] to exercise jurisdiction over such last-named activities,[1] Wycoff brought a declaratory judgment action in the United States District Court for the District of Utah for judgment declaring that all of its activities were interstate and enjoining the State Commission from interfering with its transportation of motion picture film and news reels over its routes within Utah, as authorized by the Interstate Commerce Commission.[2] * * *

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[1] *The Utah Commission had brought suit to enjoin such activities and such suit is pending in the Utah Court.*

[2] *The Commission's answer to the complaint filed in the United States District Court denied that it was interfering with interstate commerce, not because it did not intend to prevent respondent from operating, but on the ground that the operations were deemed to be intrastate commerce and therefore subject to its regulation.*

Paragraphs (4), (5), (6), (7) and (8) of Wycoff Company's complaint in the United States District Court read as follows:

> "(4) 'That the Public Service Commission of Utah issued to plaintiff and Interstate License,' No. 314,

"Most picture films originate in the laboratories of national distributors in New York, New Jersey, and Los Angeles. The distributors have set up a system of exchanges in various sections of the country, to which they send all motion picture films for exhibitors in a designated area. Such exchanges are maintained in Salt Lake City, Utah.

"All motion picture houses (exhibitors) obtain their films from the national distributors under contract with them. * * * It provides that after a picture is released for public exhibition and becomes available for exhibition by the exhibitors, the distributor agrees to deliver a print of the motion picture to the exhibitor. The film is then sent to the exchange, in this case Salt Lake City, where it is processed and readied for exhibition. In the contract the distributor agrees to make delivery of the film contracted for 'to the Exhibitor or to the Exhibitor's authorized agent, by delivery at the Distributor's exchange, or to a common carrier, or to the United States Postal authorities, *as the Distributor may elect.*' The exhibitor agrees to show the film at

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under date of August 9, 1949, by which plaintiff is authorized to transport in interstate commerce within the State of Utah motion picture films in pursuance of plaintiff's interstate commerce Certificate No. MC89684 and all subs and amendments thereto. Said Interstate License is still in full force and effect and has not been revoked or cancelled.

"(5) That the transportation of motion picture film and newsreels is interstate in its character, and the Interstate Commerce Commission has, by appropriate orders, so declared such to be a fact, and has exercised its jurisdiction thereover as to authority, rates, and safety regulations.

"(6) That the defendant Commission and the defendant members thereof threaten to and are attempting to stop and prevent plaintiff from transporting motion picture film and newsreels between points and places within the State of Utah, and they are thereby interfering with the conduct of interstate commerce by the

the designated date and, at the conclusion of such showing, transport it to the next exhibitor at his expense. Thus in rotation each exhibitor agrees to transport the film at his own expense until it reaches the last exhibitor, who then is obligated to deliver it at his cost back to the exchange, from where it is returned to the distributor for final disposal. * * *"

[fol. 101] The United States District Court refused to issue the injunction on the ground that the transportation in question was in intrastate commerce and subject to regulation by the Utah Commission. The United States Court of appeals found that the transportation in question was in interstate commerce, reversed the judgment of the lower court, and remanded the case.

In the majority opinion delivered by Justice Jackson the United States Supreme Court found that Wycoff offered no evidence whatever of any past, pending or threatened action

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plaintiff and imposing an undue burden upon interstate commerce.

"(7) That unless the defendants are enjoined, they will block, harass and prevent plaintiff in the transportation of said motion picture film and newsreel in Utah, to the detriment of plaintiff and the shipping public, and plaintiff has no other speedy or adequate remedy and will suffer irreparable injury unless defendants are enjoined from their threatened action.

"(8) That this case arises under the Constitution and the laws of the United States in that Section 8 of Article I of said Constitution grants to the Congress of the United States the power to regulate commerce among the several states, and the Congress has delegated to the Interstate Commerce Commission power and authority to ascertain the nature of interstate commerce and the exclusive authority to regulate the same.

The Utah Commission's answer to these paragraphs of the Complaint reads as follows:

"Defendants admit the allegations of paragraphs four (4) and five (5) of said complaint except the parts of said paragraphs alleging or inferring that the trans-

by the Utah Commission touching its business in any respect even though the pleadings (see footnote [2] above) made that a clear-cut issue. Such matter was in issue only if the transportation in question was in interstate commerce. The pleadings of the Utah Commission admitted the allegations respecting the threat of irreparable injury to the extent such allegations applied to intrastate transportation, and the answer showed that the Utah Commis-[fol. 102] sion considered all the transportation in question to be intrastate.

The court, however, does not base its decision solely on the ground of lack of proof of any threatened or probable act of the defendants which might cause irreparable injury but relies also on other defects appearing in its discussion of declaratory relief.

The language of the decision is so appropriate we can do no better than to quote from it:

"Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be

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portation of motion picture film (except newsreels) by plaintiff between points in and within the State of Utah is interstate in character, or that the Public Service Commission of Utah has by issuance of an 'Interstate License' thereby declared that said transportation of motion picture film within the State of Utah or wholly between points in the State of Utah is in interstate commerce or interstate in character, or that the Interstate Commerce Commission has by any of its orders or otherwise declared such transportation to be interstate in character, which parts are specifically denied.

"Defendants admit the allegations of paragraphs six (6), seven (7), and eight (8) except the parts alleging or inferring that defendants are interfering or attempting to interfere with the conduct of transportation in interstate commerce by the plaintiff, or that defendants are imposing or attempting to impose a burden upon such interstate commerce, or that defendants are blocking or preventing plaintiff from the conduct of transportation of motion picture film in interstate commerce, which parts are specifically denied."

used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Eccles* v. *Peoples Bank*, 333 U.S. 426. See *Colegrove* v. *Green*, 328 U.S. 549. Responsibility for effective functioning of [fol. 103] the administrative process can not be thus transferred from the bodies in which Congress has placed it to the courts.

"But, as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.

"Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is

even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission can not hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

"The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

"In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint is an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense [fol. 104] to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. *Tennessee*

v. *Union and Planters' Bank*, 152 U.S. 454; *The Fair* v. *Kohler Die and Specialty Co.*, 228 U.S. 22; *Taylor* v. *Anderson*, 234 U. S. 74.

"Since this case should be dismissed in any event, it is not necessary to determine whether, on this record, the alleged controversy over an action that may be begun in state court would be maintainable under the head of federal-question jurisdiction. But we advert to doubts upon that subject to indicate the injury that would be necessary if the case clearly rested merely on threatened suit in state court, as, for all we can learn, it may.

"We conclude that this suit cannot be entertained as one for injunction and should not be continued as one for a declaratory judgment. The judgment below should be reversed and modified to direct that the action be dismissed."

In conclusion we again wish to point out to this Court that defendants are making no claim under federal law. The claim of jurisdiction over plaintiffs' rates and charges is founded upon Sections 20 and 22 of the Constitution of the State of California.

II

Sections 1701 through 1706 of the Public Utilities Code of the State of California set forth the rules governing the issuance of orders by the defendant Commission. These provisions read as follows:

"1701. All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

"1702. Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agri-

cultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or change heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of [fol. 105] trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service.

"1703. All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties. In any review by the courts of orders or decisions of the commission the same rule shall apply with regard to the joinder of causes and parties as herein provided. The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.

"1704. Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the corporation or person complained of. Service in all hearings, investigations, and proceedings pending before the commission may be made upon any person upon whom a summons may be served in accordance with the provisions of the Code of Civil Procedure, and maybe made personally or by mailing in a sealed envelope, registered, with postage prepaid. The commission shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice

thereof, not less than 10 days before the time set for such hearing, unless the commission finds that public necessity requires that such hearing be held at an earlier date.

"1705. At the time fixed for any hearing before the commission or a commission, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order.

"1706. A complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review an order or decision of the commission, a transcript of such testimony, together [fol. 106] with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission, but if the petitioner and the commission stipulate that certain questions alone and a specified portion only of the evidence shall be certified to the Supreme Court for

its judgment, such stipulation and the questions and the evidence therein specified shall constitute the record on review."

The above provisions of the Public Utilities Code clearly show that the letters from the Secretary of the Commission to the plaintiff United should not be construed as orders of the Commission which will subject United to the pains and penalties of the law. The Commission being a creature of the law, it may operate only pursuant thereto, and whatever may have been the fear or the misunderstanding of the plaintiffs the law controls and the plaintiffs, of course, are presumed to know the law.

Section 1702 of the Public Utilities Code envisions the type of procedure which was followed in this case. It provides that where a utility has done or has omitted to do anything in violation of law or an order or rule of the Commission, the Commission or any other person may file a complaint against the utility. The matter is then heard and the decision and order of the Commission follows.

The law required the plaintiff United in this case to file its rates with the Commission. It had not done so and the Commission by letters called the matter to United's attention and instructed it to comply with the law. This plaintiff United has refused to do, and it follows under the established procedure that a complaint would be filed by the Commission pursuant to the provisions of Section 1702 of the Public Utilities Code. *Instead of the letters of the Commission being the end of the administrative process they were merely the beginning of the administrative process under the law.*

Such letters were merely preliminary to the issuance of an order of investigation and were notice to plaintiff United that it might expect an order of investigation to be instituted as provided by the applicable law. They were issued for the purpose of placing plaintiff [fol. 107] United upon notice so that it could not say that an order of investigation had been issued against it out of the blue sky and without the courtesy of its having been apprised of the intention of the Commission. Furthermore, a voluntary compliance by plaintiff United with the in-

struction to file its tariff would have obviated the necessity of the issuance of an order of investigation.

III

In paragraph II above we have pointed out that the letters from the Secretary of the Commission were the beginning of the administrative process rather than the end and that plaintiff United would be presumed to know this. In addition at the time of trial statements of counsel for defendants and the testimony of their witness fully explained the purport of the letters and the intention of the Commission respecting the procedure to be followed in seeking to require plaintiffs United to file its tariffs.

We quote from pages 61 and 62 of Reporter's Transcript of the hearing on November 21, 1952:

"Mr. Phelps: Q. I shall just ask the Judge to describe what the position of the Commission, with respect to this Catalina operation, was prior to the bringing of this suit and what it is now.

"Mr. Treadwell: We object to that, Your Honor. This is calling for the conclusion of the witness. The position of the Commission is shown by the answer which we are trying this case on. It shows exactly what its position is, and it is also shown by the letters written by the Commission, the Commission's Secretary, insisting in their right to regulate this line, these rates, and it is also shown in a certain way by certain testimony of mine. I don't think the witness could give his conclusion.

"Judge Orr: The objection is overruled.

A. The intention—I can speak for myself, in the statutory duty that I perform, there was no intention on my part to bring penalty actions against this air carrier in connection with this Catalina operation. There was no intention on the part of the Commission to do so either. The only intention that was ever expressed was that if these rates were not filed that an order of investigation would be instituted where the question of jurisdiction would be determined in the orderly course of due process of law.

"We have never changed our position. That was our intent then. That is our intent now."

[fol. 108] Such testimony clearly shows that the Commission never intended such letters to be final orders but intended them to place plaintiff on notice that formal proceedings would be instituted if they were not complied with. The factual situation at the time of trial, and not what may have been plaintiffs' unfounded apprehensions arising through their failure to understand the normal administrative processes of the defendant Commission, should govern this Court in its determination whether a justiciable controversy has arisen and whether a permanent injunction should issue.

IV

On the one hand, plaintiffs have said to this Court that the letters from the Secretary of the Commission have the dignity of orders of the Commission. With this proposition defendants, as previously discussed, do not agree. On the other hand, plaintiffs have said that they have no administrative remedy themselves but must wait for the Commission to institute an investigation. Assuming for the sake of argument that the letters are orders issued in a complaint or investigation proceeding, as no effective date is specified, in accordance with Rule 74 of the defendant Commission's Rules of Procedure they would become effective 20 days after service.

Sections 1731 and 1756 of the Public Utilities Code read as follows:

"1731. After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any

corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the commission for a rehearing.

"1756. Within 30 days after the application for [fol. 109] a rehearing is denied, or if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued."

Under these sections plaintiff United could have filed an application for rehearing within 20 days after service of the letters upon it. If the applications for rehearing were denied or if the decisions on rehearing were adverse, plaintiff United could then have applied to the Supreme Court of the State of California for a writ of review.

Under its own theory of the case plaintiff United has failed to exhaust its administrative remedies and the orders have now become final.

We again refer this Court to the cases cited in paragraph II of the points and authorities in support of defendants' motion to dismiss which hold that plaintiffs are bound to exhaust the administrative remedies available to them as a condition precedent to seeking judicial relief.

In addition we also wish to refer this Court to the following cases which have not previously been cited:

Endicott Johnson Corp. v. *Perkins*, 317 U.S. 501, 87 L. ed. 424. *Tobin* v. *Banks & Rumbaugh*, January 14, 1953, —— C.A. 5, 21 Law Week 2353.

V

It is a matter of common knowledge and common sense that the defendant Commission would not institute an order

of investigation on its own motion unless it believed it had jurisdiction over the subject matter of the investigation. This, of course, does not mean that the Commission in such matter has prejudged the case and that the defendant will be foreclosed from raising the jurisdictional issue. Nevertheless, if in the course of the proceeding or on appeal it [fol. 110] is finally determined that the Commission does not have jurisdiction, defendant actually will have suffered injury only to the extent that he has spent time and money in defending himself. But he has not been deprived of property without due process of law nor has he sustained the type of injury which would have entitled him to equitable relief.

We are surprised to find such argument having been made by counsel for the Civil Aeronautics Board. Put the shoe on the other foot. Suppose United claimed that the transportation in question was intrastate rather than interstate and the Civil Aeronautics Board were seeking to require United to obtain a certificate of public convenience and necessity and file tariffs of its rates and charges. Would the Civil Aeronautics Board contend and would this Court hold that this Court in an application for an injunction should determine the jurisdictional question of whether the transportation were intrastate or interstate prior to the exhaustion of the administrative process. We think not.

In the *Tobin* case, cited in paragraph IV above, the Court of Appeals held in that Section 6(c) of the Administrative Procedure Act authorizing the court to enforce administrative subpoena to the extent it is "in accordance with law," does not require the court in a proceeding under the Fair Labor Standards Act seeking the enforcement of investigative subpoena to first determine that employment is covered. The employer had urged that the court should determine whether the employer and the subject matter to which the subpoena is directed are covered by the Act.

The Court of Appeals in following the rule laid down in *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, made the following appropriate statement:

> "To give effect to [the employer's] contention would, in most instances, sterilize the investigative

powers of the Administrator and force him to trial without the benefit of the very evidence which the subpoena is designed to secure. Refusal of the courts to refrain from adjudicating the issue of coverage in the enforcement proceeding would result in a maelstrom of confusion, for by their refusal to permit investigation, employers would be enabled to secure a [fol. 111] premature judgment on that issue and the very evil which Congress sought to overcome would prevail over the guardian appointed to correct it."

VI, VII, and VIII

In support of grounds 6, 7 and 8 of our motion for new trial we wish to incorporate by reference paragraph III of our Points and Authorities in Support of Motion to Dismiss. We have nothing further to add at this time.

IX

The Johnson Act, 28 U.S.C.A. 1342, provides as follows:

"1342. Rate orders of State agencies

"The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

(2) The order does not interfere with interstate commerce; and,

(3) The order has been made after reasonable notice and hearing; and,

(4) A plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932."

While we contend that the letters from the Commission Secretary to plaintiff United are not orders of the Commission, this Court appears to have held that such letters are orders. We therefore wish to point out that such

letters affect rates; they were sent after considering the contentions of plaintiff United; and, in our opinion, they in no way affect interstate commerce. This action is based on repugnance of the letters to the Federal Constitution, although there is an additional contention that the action is contrary to a Federal statute.

X

The record clearly shows that defendants have not sought to exercise jurisdiction over any aspect of plaintiffs Catalina operations other than rates and charges for services. The provisions of the Constitution of the State of California which defendants are presently seeking to enforce authorize defendants to regulate no other aspect of the [fol. 112] operation in question. Concerning aspects of plaintiffs Catalina operation other than rates and charges there clearly is no controversy and no threat of irreparable injury. The judgment of this Court should therefore be modified accordingly.

Conclusion

The judgment of this Court is far-reaching and significant in its effect on the proper functioning of administrative agencies and in its effect on the relationship between state and federal authority and particularly state and federal courts under our dual form of government.

In conclusion, it is respectfully submitted that reason and authority require that the defendant Commission be permitted to exhaust its administrative processes and to that end this Court should grant defendants' motion for a new trial.

Respectfully submitted, (S.) Everett C. McKeage, Chief Counsel; J. Thomason Phelps, Senior Counsel; Wilson E. Cline, Attorneys for Defendants, 514 State Building, San Francisco, California.

[fols. 113-114] Affidavit of Service by Mail.

(Omitted in printing)

[fol. 115] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENOR'S ANSWER TO DEFENDANTS' MOTION FOR NEW TRIAL—filed February 17, 1953

In their motion for a new trial, defendants place principal reliance upon the recent decision in *Public Service Commission of Utah* v. *Wycoff Company*, 344 U.S. 237 (December 22, 1952). That decision, according to the defendants, establishes "that plaintiffs herein are entitled to no relief in the Federal District Court because there exists an adequate remedy in the courts of the State of California for the purpose of reviewing any action already taken or that may be taken by the defendants herein pertaining to the subject-matter of the above-entitled action" (Paragraph 1 of Motion, p. 2).

We do not so interpret this decision. Irrespective of what the Court of Appeals may have had to say concerning the facts and pleadings of the *Utah* case (paragraph 1 of argument in support of motion, pp. 4, 5), the Supreme Court held that the case could not be maintained as an injunction action "because there is no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief by injunction" (344 U.S. at p. 241). Neither could the case be maintained as an action for declaratory judgment, because it had not "taken on fixed and final shape so that [fol. 116] a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them" (344 U.S. at p. 244). The Court did not purport to limit the jurisdiction of the Federal Courts to grant injunctive relief in cases where irreparable injury is established, or to lay down any tests for establishing irreparable injury different from those heretofore established by applicable case law. Neither did it hold that Federal declaratory relief cannot be obtained in a proper case against a State regulatory agency.

The *Utah* case is characterized, and thus distinguished from the instant case, by at least the following factors:

(1) There was no proof of any *threatened* or *probable* act which might cause irreparable injury (344 U.S. at p. 241);

(2) The dispute had not matured to a point where the Court could determine that any concrete controversy would develop since no risk of suffering penalty, liability or prosecution had been demonstrated (344 U.S. at p. 245);

(3) The declaratory decree sought would not have ended the controversy, and further proceedings would have been required when the Commission undertook to impose specific regulatory requirements (344 U.S. at p. 246). There would then be need for evidence concerning the facts then existing (344 U.S. at p. 247), and the evaluation of that evidence, relating to operations unquestionably physically intrastate, obviously would best be left in the first instance to an agency expert in transportation problems;

[fol. 117] (4) There was no claim by the Interstate Commerce Commission, the Federal regulatory agency concerned, of any infringement of its jurisdiction.

In the present case, the plaintiffs have fully sustained the burden of showing both *threatened* and *probable* action which would cause irreparable injury. Complainants' testified to a direct threat of penalty actions, which threat was not actually denied by the defendants. The defendants in the past have caused penalty actions to be instituted against United for violations of regulatory requirements which occurred prior to the Commission's determination of jurisdiction, and this course of action demonstrates a strong possibility of probable similar action with respect to the Catalina controversy. Moreover, the defendants already have asserted, and continue to assert, that they have jurisdiction over the Catalina operations. They concede that they intend to require the plaintiffs to appear and defend in a proceeding before the Commission, which we think will be only an empty formality, and that the cost of defending such proceeding will exceed $3000 for which the plaintiffs will not be recompensed. Under these circum-

stances, the plaintiffs have demonstrated, and the Court has found, a clear need for equitable relief.

An actual controversy has developed between the parties, with the defendants contending that the State of California has regulatory jurisdiction over the Catalina operations as intrastate transportation, and the plaintiffs and intervenor contending that the operations are interstate and under the exclusive regulatory jurisdiction of the intervenor. The controversy is concrete with respect to tariffs and rate control over the operations. There is no uncertainty as to the claims of either side, or of the action which the Commission proposes. It cannot be contended [fol. 118] that the merits of the problem here involved are dependent upon a resolution of complicated facts within the peculiar competence of a regulatory body. The facts are not in dispute, and the questions presented are entirely questions of law. The Court's decree finally settles the controversy. The case meets all the prerequisites for declaratory relief.

We believe this case to be entirely controlled by cases such as *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218; *Bethlehem Steel Corp.* v. *N.Y. State Labor Relations Board*, 330 U.S. 767; *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456; and *Cloverleaf Co.* v. *Patterson*, 315 U.S. 169. These cases were not even cited in, and much less overruled by, the *Utah* case. In the *United Fuel* case, for example, the Court specifically adverted to the fact that the State Commission there involved "has not yet done more than assert its jurisdiction over United's rates" (317 U.S. at p. 465). It nevertheless upheld the granting of injunctive relief by the Federal Court, stating (317 U.S. at pp. 468 and 469):

> "Since these orders are invalid insofar as they impinge upon an authority which Congress has now vested solely in the Federal Power Commission, the decree below must stand unless we can fairly conclude that it was an abuse of discretion for the District Court to grant relief by way of injunction. It is perhaps unnecessary at this late date to repeat the admonition that the federal courts should be wary of interrupting the proceedings of state administrative

tribunals by use of the extraordinary writ of injunction. But this, too, is a rule of equity and not to be applied in blind disregard of fact. And what are the commanding circumstances of the present case? First, and most important, the orders of the state Commission are on their face plainly invalid. No inquiry beyond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act. If, therefore, United complies with these orders, it will be put to the expenditures incident to ascertaining the base for rate-fixing purposes—expenses which may ultimately be borne by the consuming public and which Congress, by conferring exclusive jurisdiction upon the federal regulatory agency, necessarily intended to avoid. If United does not comply with the orders, it runs the risk of incurring heavy fines and penalties or, at [fol. 119] the least, in provoking needless, wasteful litigation. In either event, enforcement of the Commission's orders would work injury not assessable in money damages, not only to the appellee but to the public interest which Congress deemed it wise to safeguard by enacting the Natural Gas Act. In these circumstances, we cannot set aside the decree of the District Court as an improper exercise of its equitable jurisdiction. *Petroleum Co.* v. *Public Service Commission*, 304 U.S. 209, was a very different case. There the regulation of intrastate rates alone was involved, no conflict between federal and state authorities was in issue, and the appeal to equity sought to anticipate the appropriate exhaustion of the administrative process."

The motion for new trial should be denied.

Respectfully submitted, Chauncey Tramutolo, United States Attorney for the Northern District of California; Charles Elmer Collett, Assistant United States Attorney for the Northern District of California; John H. Wanner, Associate General Counsel, Civil Aeronautics Board, Washington 25, D. C.; O. D. Ozment, Attorney, Civil Aeronautics Board, Washington 25, D. C., Attorneys for the Civil Aeronautics Board.

[fol. 120] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAINTIFFS' ANSWER TO DEFENDANTS' MOTION FOR NEW TRIAL—filed February 19, 1953

This case has been so thoroughly argued that we do not deem it necessary to present further argument to the court except for the reliance of defendants on the decision in *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U. S. 237. We feel that the *Utah* case is clearly distinguish-
[fol. 121] able from the case at bar in the following particulars:

1. The Court pointed out that before that action was commenced an action was commenced by the Commission in the state courts and that the plaintiffs then hurried to the federal courts to prevent a decision by the state courts in the matter. This is certainly quite different from the case at bar. Here the plaintiffs had been acting under the jurisdiction of the Civil Aeronautics Board ever since 1938, and during all of that period the state commission never brought any proceeding to have the matter determined in the state courts.

2. The Court pointed out the right of the state commission to first decide the matter, but in the case at bar the court has before it not only the state commission with its right to decide the matter but also has the Civil Aeronautics Board which has, as the administrator of the Federal Act, like power and right to decide the matter.

3. The Court, in the *Utah* case, pointed out that all that was asked was a decision on an abstract question as to whether a certain procedure involved interstate commerce; while in the case at bar the plaintiffs and intervenor both claim that the matter is in the exclusive jurisdiction of the Civil Aeronautics Board, and they ask both for declara-

tory judgment and an injunction against interference with such jurisdiction.

4. The Court pointed out that there was no evidence offered of any threatened action by the Utah Commission; whereas, in the case at bar it was pointed out that the state statute imposed penalties of $2000 per day, that the Commission contended that the penalties were applicable to air lines, and that the Commission had imposed penalties of $138,000 for 69 days' collection of a rate which had been held reasonable by the Commission, but which technically had not yet gone into effect.

[fol. 122] 5. The Court based its decision largely on the ground that the judicial power does not extend to abstract questions, which is not applicable here. The Court has held that the controversy must take on a definite form; here, we showed that the Commission, in writing, had ordered the plaintiffs to file their rates with the Commission.

6. The Court expressly held that in the *Utah* case there was no threat of any penalty; whereas in the case at bar a heavy penalty is prescribed by state law, according to the contentions of the Commission.

7. The Court also held that, in view of the limited nature of the relief sought, a decision would not settle anything; whereas in the case at bar the court has by its judgment definitely decided which party has jurisdiction over the route in question.

8. We have had an opportunity to see intervenor's answer to defendants' motion for a new trial and, in view of that answer, we think the foregoing is sufficient to entirely differentiate the case at bar from the *Utah* case. The defendants have had 15 years within which to seek a decision in the state courts. Even if the case at bar were dismissed, there is no assurance that an action would be brought in the state courts.

9. For the convenience of the court and counsel we here set forth in detail an analysis of the differences and distinctions between the case at bar and the *Utah* case:

Utah Case	*Catalina Case*
The complaint alleged "that carriage between points in Utah was so integrated with their interstate movements that the whole constituted interstate commerce." (94 Adv. L. Ed. 178)	The court found it to be a conclusion of law that the route in question was in and of itself an interstate route, irrespective of its connection or integration with any other interstate commerce. (Conclusions 5 and 6) And it was found to be a fact that the Civil Aeronautics Act controlled over interstate routes of this nature. (Finding 4)
[fol. 123]	
A portion of this case considers the legal requirements of a three-judge court. Outside of a recitation in the complaint, the constitutionality of any Utah statute or any commission order was never attacked. (p. 179)	It was found to be a fact that plaintiffs claimed the enforcement of certain California penalty statutes which may be applicable to air carriers would be so unreasonable and oppressive as to be a violation of the Fourteenth Amendment of the Constitution, and thus a substantial question was presented as to the validity of these statutes, which in and of itself necessitated the invoking of a three-judge court to resolve all issues presented by the plaintiffs. (Conclusion 3)
"The only issues defined on pretrial hearing were whether as matter of fact and of law the within-state transportation constituted interstate commerce." (p. 179)	The following issues were resolved: a) That the route was interstate; b) That the Civil Aeronautics Board had exclusive jurisdiction over the route (Conclusion 1);

Utah Case	*Catalina Case*
	c) That there was a threat of penalties by the Commission against plaintiffs (Conclusion 3);
	d) That these penalties would be excessive and burdensome on interstate commerce (Conclusion 3);
	e) That plaintiffs had no adequate remedy in the state courts.
"The trtal court, however, made a general finding that no such interference had been made or threatened * * *."	Trial court found as a matter of fact that these threats had been made (Finding 10) and that the Commission asserts jurisdiction over the route, in conflict with the Civil Aeronautics Board, and that the plaintiff would be put to an expense in excess of $3000 in defending itself in any proceeding before the Commission.
It was held that the complaint was "wanting in equity because there is no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief by injunction." (p. 179)	There was direct testimony of a threatened action by the Chief Counsel of the Commission that said Commission would investigate the route and if it found that United had been collecting rates and fares which had not been filed with the Commission that Commission would institute actions to recover penalties from United. (Transcript p. 19)

[fol. 124] *Utah Case*

Plaintiff abandoned the complaint for injunctive relief "but seeks to support it as one for declaratory judgment, hoping thereby to avoid both the three-judge

Catalina Case

Furthermore, it was found that Commission advised United by letters of 9/20/51 and 12/27/51 that Commission had jurisdiction over the route and *directed* United to file its tariffs with the Commission. (Finding 10) Commission by its answer to the complaint and by direct testimony manifested an intent to investigate United's route and fare structure in the Catalina operation. It was found that United would incur legal expense in excess of $3000 in defending these proceedings and that there exists in California statutes which provide for penalties up to $2000 for violation of tariff regulations (Finding 11), and that in the past Commission has instigated penalty actions against United. The refusal of United to comply with Commission's directives regarding the route subjects United to the risk of incurring said penalties and to the cost of defending against said penalty suit. (Finding 13)

Neither the prayer for injunctive relief nor that for a declaratory judgment was abandoned, and in fact the court gave the requested relief in both instances. (Opin-

Utah Case	*Catalina Case*
court requirement and the necessity for proof of threatened injury." (p. 179)	ion of Court 12/3/52)
"Whether declaratory relief is appropriate under the circumstances of this case apparently was not considered by either of the courts below." (p. 179)	It was expressly found that an actual controversy, under the Declaratory Judgment Act (28 USCA, sec. 2201), existed between the parties concerning the question of "whether the plaintiff air carriers are to be regulated by the Public Utilities Commission of the State of California or by the Civil Aeronautics Board." (Conclusion 1)
[fol. 125]	
In regard to declaratory relief the *Utah* case set forth the postulate that "the conflicts of interest must be 'ripe for determination' as controversies over legal rights." The Court went on to say: "The complainant in this case does not request an adjudication that it has a right to do, or to have, anything in particular. It does not ask a judgment that the Commission is without power to enter any specific order or take any concrete regulatory step. It seeks simply to establish that, as presently conducted, respondent's carriage of goods between points within as well as without Utah is all interstate commerce." (p. 181)	Plaintiffs' complaint included the following in the prayer: a) Congress has preempted the complete control of the route; b) None of the penalties claimed by the Commission are valid; c) Declaratory relief from the above two; d) If the penalties are binding, they are invalid under the Fourteenth Amendment; e) Seeks an injunction preventing Commission from proceeding to collect the penalties.

Utah Case	*Catalina Case*
The record in the Utah case is silent as to the rights and immunities affected if these routes are not declared interstate commerce. The Court said in this regard that "We may surmise that the purpose to be served by a declaratory judgment is ultimately the same as respondent's explanation of the purposes of the injunction it originally asked, which is 'to *guard against the possibility* that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission.'"	There is no silent undeclared purpose in this case. The complaint, evidence, opinion and findings of fact and conclusions of law clearly and unequivocally set forth that henceforth this route be declared under the exclusive control and jurisdiction of the Civil Aeronautics Board and that the Commission be enjoined permanently from "in any manner, interfering with such paramount jurisdiction". (Opinion p. 5)
The Court said "that respondent and its predecessors in interest long made it a practice to obtain from the Utah Commission certificates to authorize this carriage of film commodities between points in Utah."	It was held to be a fact, and so found by the court, that "Tariffs for the carriage of persons and property were maintained on file with the Civil Aeronautics Board, and not with the defendant Public Utilities Commission, during all periods of operation by Wilmington-Catalina Airlines, Ltd. and its successor Catalina Air Transport; and operations were otherwise conducted under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board." (Finding 8)

[fol. 126] *Utah Case*

It was shown that the "Supreme Court of Utah * * * sustained the Commission in denying such an application upon a finding that the field already was adequately served." Also the Court noted that the Commission had filed a petition in "Utah state court to enjoin respondent from operating between a few specified locations within the State, but that process was never served."

In this connection, the Court said that "We may conjecture that respondent fears some form of administrative or judicial action to prohibit its service on routes wholly *within* the State, without the Commission's leave. What respondent asks is that it win any such case before it is commenced." (Emphasis added.) (p. 181)

"The carrier's idea seems to be that it can now establish the major premise of an exemption, *not as an incident of any present declaration of any specific right*

Catalina Case

There was no litigation pending, nor was there any existing administrative action concerning the route at the time the suit was commenced.

This case is distinguished, first, because it was found to be a fact that the route was over the high seas and was under the exclusive control and jurisdiction of Civil Aeronautics Board; and, second, that there is a conflict of interests between two administrative boards—one Federal and one State—which must be resolved by a court, else plaintiff United would obey the mandates of one at the peril of penalty by the other. (Findings 9 and 10)

Here it was found expressly to be a fact that if permitted by the court the Commission would institute proceedings before the Commission for the purpose of

Utah Case	*Catalina Case*
or immunity, **but to hold in readiness for use should the Commission at any future time attempt to apply any part of a complicated regulatory statute to it." (Emphasis added.) (p. 181)**	**asserting jurisdiction, to which proceeding plaintiffs will be made parties, and then, if United fails to file its tariffs after having been formally ordered to do so, penalty actions will be brought against United; that United does not admit that Commission has jurisdiction over the route; and that it would cost in excess of $3000 to defend itself in any such proceeding before the Commission. (Finding 11)**
[fol. 127]	
In stating that the facts are not such as to warrant declaratory relief, the Court said:	**The controversy here is mature. Two agencies claim jurisdiction, with the plaintiffs caught in the middle. The controversy involves prosecution for failure to obey rules and regulations of an administrative board no matter which way plaintiffs turn. The controversy involves excessive penalties if plaintiffs turn the wrong way. It also involves the outlay of large sums of money to defend against said penalty suits; said defense being at plaintiffs' peril, as statutory penalties accrue daily at the rate of $2000 per day.**
"In the first place, this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment. *If there is any risk of suffering penalty, liability or prosecution, which a declaration would avoid, it is not pointed out to us.*" (Emphasis added) (pp. 181, 182)	

Utah Case

The Court then had this to say:

"If and when the State Commission takes some action that raises an issue of its power, some further declaration would be necessary to any complete relief. The proposed decree can not end the controversy.

Nor is it apparent that the present proceeding would serve a useful purpose if at some future date the State undertakes regulation of respondent." (p. 182)

Catalina Case

In this case the State has acted. The Commission, through its secretary, has by letter directed plaintiff United to file tariffs. If United does not file tariffs, defendant Commission, by direct testimony, will institute proceedings against United, and the end result, by law, would be confiscatory penalties and huge legal expenses. (Findings 10 & 11)

Furthermore, the *Utah* case only asks that certain routes, entirely within the State of Utah, be declared interstate routes. There is no other request, and there is no suggestion as to what the result of this declaration would be.

In the *Catalina* case the declaration is that *"the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiff in its operations in the described route"* (Emphasis added) and "permanently forbidding and enjoining the defendants from, in any manner, interfering with such paramount jurisdiction." This is positive and real relief, as opposed to the nebulous and uncertain relief requested in the *Utah* case.

[fol. 128] *Utah Case*	*Catalina Case*
The Court admitted that the remedy was not to be withheld because it necessitated weighing conflicting evidence or deciding issues of fact as well as law, "But when the request is not for ultimate determination of rights but for preliminary findings and conclusions intended to fortify the litigant against future regulation, it would be a rare case in which the relief should be granted."	Here the regulation is present, the Commission has stated unequivocally that it has jurisdiction over this route, and that it intends to exercise same, and has ordered United to comply with these regulations. Civil Aeronautics Board simultaneously claims jurisdiction over the same route. This is a present, existing controversy, ripe for settlement.
The Court said that the declaratory judgment procedure should "not be used to preempt and prejudice issues that are committed for initial decision to an administrative body or special tribunal * * *."	Here Congress has expressly preempted the field from state regulation. (Finding 4) There is nothing for the State Commission to regulate, yet the Commission persists in forcing United to file its tariffs. This is not something which could be construed as interstate commerce by applying the "substantial burden test", it is interstate commerce as defined by the Laws of Congress, subject to Federal regulation only, and to this end declaratory relief is properly requested. (Finding 4)
The Court said that the "carrier, being in some disagreement with the State Commission, rushed into federal court to get a decla-	This case is not for the purpose of interpreting a state statute. We know how the State Commission has interpreted it because the

Utah Case

ration which either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.

* * *

It is the state courts which have the first and the last word as to the meanings of state statutes and whether a particular order is within the legislative terms * * *." (p. 182)

[fol. 129]

"Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be res judicata, so that the Commission can not hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights." (pp. 182, 183)

Catalina Case

Commission has ordered United to abide by its terms and file the tariffs. The statute we are concerned with is the Federal Civil Aeronautics Act, (49 USCA, sec. 401, et seq.) which entirely preempts the route in question from State control. This is the subject for which declaratory relief was asked and received. (Finding 4; Conclusion 6; Opinion 12/3/52).

This is not anticipatory judgment, but enforcement of the mandate of Congress that the Civil Aeronautics Board, and the Civil Aeronautics Board alone, shall be the regulatory body over this route. The State Commission has already ordered United to obey its regulatory order. Here United seeks judicial advice, whether it should obey Congress or the State Commission. No matter which way plaintiff United acts, there is punitive retaliation; therefore a declaration of paramount authority was asked for and received. There is nothing for the State Commission to decide, because it has no authority to decide anything or regulate anything in respect to this route. (Finding

Utah Case	*Catalina Case*
	4, Conclusion 6, Opinion 12/3/52)
The Court was concerned about the orderly procedure for protection of litigants who have been denied federal rights, and remarked that "Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.	We are not here to determine rights or set up defenses in state courts. We are here to find out who has the paramount authority over the route in question. The court has found that the Federal Government has this right. The mere fact that defendant Commission is disputing this decision shows a controversy between two regulatory bodies.
In this case * * * The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted." (p. 183)	
The Court put the issue correctly when it said "If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim." (p. 183)	This case directly concerns the claim under Federal Law that the route in question is a Federal route, not subject to State control.

[fol. 130] *Utah Case*	*Catalina Case*
The Court stated that since this case was to be "dismissed in any event, it is not necessary to determine whether, on this record, the alleged controversy over an action that may be begun in state court would be maintainable under the head of federal-question jurisdiction."	There is no doubt that a substantial federal question exists in determining the paramount jurisdiction of an air route over the high seas, when Congress asserts control in one instance, and the Public Utilities Commission asserts control in another.

We respectfully submit that the motion for a new trial should be denied.

Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, Mayer, Meyer, Austrian & Platt, John T. Lorch, Attorneys for Plaintiffs.

[fol. 131] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION FOR A NEW TRIAL—filed February 20, 1953

Defendants' motion for a new trial herein was argued and submitted. Upon the argument and in the briefs submitted, counsel for defendants cited the case of Public Service Commission of Utah v. Wycoff Company, 344 U.S. 237, decided December 22, 1952. We find the cited case to be plainly distinguishable here. The motion for a new trial is denied.

Dated: February 20, 1953.

Wm. E. Orr, United States Circuit Judge; E. P. Murphy, United States District Judge; Louis E. Goodman, United States District Judge.

[fol. 132] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

Before: Hon. William E. Orr, Circuit Judge, Hon. Louis E. Goodman, District Judge, Hon. Edward P. Murphy, District Judge.

PETITION FOR APPEAL—filed March 27, 1953

Considering themselves aggrieved by the final decree and judgment of this Court entered on January 28, 1953, the Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of [fol. 133] and Collectively Constituting the Public Utilities Commission of the State of California, Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California, defendants herein, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said defendants, and that the amount of security be fixed by the order allowing the appeal, and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Dated March 27, 1953.

Respectfully submitted, (S.) Everett C. McKeage, Chief Counsel; J. Thomason Phelps, Senior Counsel; Wilson E. Cline, Attorneys for Defendants-Appellants, 514 State Building, San Francisco 2, California.

[fol. 134] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—filed March 27, 1953

The Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities [fol. 135] Commission of the State of California, defendants herein, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this cause entered on January 28, 1953, and from each and every part thereof, and having presented their assignment of errors and prayer for reversal and their statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $500.00, with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with law.

It is further ordered that the Clerk of this Court transmit the material parts of the record as required and in the manner provided by Rule 10 of the Rules of the Supreme Court of the United States.

Dated March 27th, 1953.

(S.) Louis E. Goodman, District Judge.

[fols. 136-137] Citation in usual form showing service on Treadwell & Laughlin, Chauncey Tramutolo et al omitted in printing.

[fol. 138] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—filed March 27, 1953

The Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Evertt C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public [fol. 139] Utilities Commission of the State of California, defendants in the above-entitled case, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment of the District Court entered against them on January 28, 1953.

The Three-Judge District Court erred:

1. In finding that aircraft flying between Avalon and Wilmington were required to fly over approximately 24 miles of water not within the boundaries of the State of California.

2. In finding that the tariffs and operations of Wilmington-Catalina Airlines, Ltd., and its successor Catalina Air Transport, and of United Air Lines have been and are being conducted under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board.

3. In finding that the statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that operations are conducted by carriers without effective tariffs being on file with the defend-

ant Commission and in finding that defendants in the past have asserted that these statutory penalties are applicable to air carriers, and have caused proceedings to be instituted in the California Courts for the recovery of these penalties against various air carriers, including defendant United.

4. In finding that the refusal of the plaintiff United to comply with directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has subjected and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for recovery of penalties.

5. In concluding that the District Court has jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1337, and 28 U.S.C. 2201.

6. In concluding that the Civil Aeronautics Board is entitled to seek and obtain a ruling as to its powers and juris- [fol. 140] diction as a plaintiff-intervenor in this case, and to obtain declaratory and injunctive relief against any interference by the defendants with its jurisdiction.

7. In concluding that plaintiffs raised a substantial Federal question concerning the constitutionality of the penalty provisions contained in Section 2107 of the California Public Utilities Code and that this Three-Judge District Court was properly convened.

8. In concluding that the institution of an investigation proceeding before defendant Commission would subject plaintiff and possibly the public to irreparable injury and would constitute a burden on interstate commerce and an interference with the jurisdiction of the Civil Aeronautics Board.

9. In concluding that the threat of institution of an investigation proceeding, the risks and expenditures to which plaintiff may be subjected as a result of possible penalty actions, and the actual controversy which exists between the parties are such as to entitle both the plaintiffs and the intervenor to declaratory relief and injunctive relief.

10. In concluding that plaintiffs have no plain, speedy, and efficient remedy in the Courts of the State of California, or otherwise, than by this action.

11. In concluding that the matter in issue concerns the reach of a Federal statute which conflicts with the claims of the defendants regarding state law.

12. In concluding that this Three-Judge District Court should decide the issues tendered irrespective of the existence or adequacy of any state court remedies.

13. In concluding and holding that the intervening waters between the three-mile marginal belts along the coastline of the mainland of the State of California and surrounding Santa Catalina Island are wholly outside the territory and jurisdiction of the State of California, and that aircraft passing over these intervening waters are passing through air space over a place outside of the State of California.

14. In concluding that Congress through the adoption of [fol. 141] the Civil Aeronautics Act of 1938 has declared therein that all common carrier transportation by aircraft between places in the same State when that transportation involves passage through or over territory or waters outside the State constitutes interstate air transportation.

15. In concluding that plaintiffs' operations between Santa Catalina Island and the mainland of the State of California constitute interstate air transportation as defined by the Civil Aeronautics Act of 1938, and that the powers conferred upon and exercised by the Civil Aeronautics Board leave no room for State regulation of these operations.

16. In concluding that the plaintiffs and the intervenor are entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiffs in their operations between the mainland of California and Santa Catalina Island, and permanently forbidding and enjoining defendants from in any manner, interfering with such exclusive jurisdiction.

17. In ordering, adjudging, and decreeing that the Civil Aeronautics Board has exclusive jurisdiction over the plaintiffs in their operations over the route described in the complaint, and the defendants have no jurisdiction or power of regulation over the same.

18. In permanently prohibiting and enjoining defendants and their employees, agents, and attorneys, and all persons claiming by, through or under them, from in any manner

interfering with the exclusive jurisdiction of the Civil Aeronautics Board over the plaintiffs in their operations over the route described in the complaint, or from in any way controlling or regulating said route.

19. In failing to find and conclude that no actual case or controversy such as will entitle plaintiffs and intervenor to the relief requested in the Federal District Court exists.

20. In failing to find and conclude that plaintiffs are subject to no threat of irreparable injury, which will entitle them to the relief requested in the Federal District Court.

21. In failing to find and conclude that plaintiffs have [fol. 142] failed to raise a substantial Federal question concerning the constitutionality of the penalty provisions contained in Section 2107 of the California Public Utilities Code and in failing to dissolve the Three-Judge District Court because of plaintiffs' failure to raise such substantial Federal constitutional question.

22. In failing to find and conclude that the administrative processes of defendant Commission and the administrative remedies available to plaintiffs and intervenor have not been exhausted and, therefore, plaintiffs and intervenor are not entitled to the relief requested in their respective complaints, and that said Court had no jurisdiction to entertain the same.

23. In failing to find and conclude that the plaintiffs have a plain, speedy, and efficient remedy before defendant Commission and the courts of the State of California and, therefore, the plaintiffs and intervenor are not entitled to the relief requested in their respective complaints.

24. In failing to find and conclude that the waters between the California mainland and Santa Catalina Island are not a place outside the State of California within the meaning of the definition of interstate air transportation as set forth in the Civil Aeronautics Act of 1938.

25. In failing to find and conclude that air transportation between the California mainland and Santa Catalina Island is not interstate air transportation within the meaning of the Civil Aeronautics Act of 1938.

26. In failing to find and conclude that Congress through the adoption of the Civil Aeronautics Act of 1938 has not preempted the field of regulation of air transportation be-

tween places in the State of California when that transportation involves passage through the air space over the high seas.

27. In failing to conclude that the Johnson Act, 28 U.S.C.A. 1342, precludes this Three-Judge District Court from issuing an injunction restraining defendant Commission from issuing directives and orders affecting the rates in question.

28. In failing to dissolve the temporary injunction outstanding against defendants and in failing to dismiss the complaint of plaintiffs and the complaint [fol. 143] of intervenor on file herein.

Wherefore, defendants, Public Utilities Commission of the State of California; Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and Peter E. Mitchell, Members of and Collectively Constituting the Public Utilities Commission of the State of California; Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, Legal Advisers of the Public Utilities Commission of the State of California, pray that the final decree of the District Court be reversed, and for such other relief as the Court may deem fit and proper.

(S.) Everett C. McKeage, Chief Counsel; J. Thomason Phelps, Senior Counsel; Wilson E. Cline, Attorneys for Defendants-Appellants, 514 State Building, San Francisco 2, California.

[fols. 144-196] Statement Required by Paragraph 2, Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing)

[fols. 197-198] Bond on appeal for $500.00 approved and filed March 27, 1953 omitted in printing.

[fols. 199-228] Appellants' Praecipe (omitted in printing)

[fols. 229-230] Appellants' Praecipe (omitted in printing)

[fol. 231] In United States District Court

[Title omitted]

Transcript of Proceedings on Motion for Preliminary Injunction, Motion to Dismiss and Motion to Intervene—Friday, August 8, 1952.

Appearances:

For Plaintiffs: Messrs. Treadwell & Laughlin, by Reginald S. Laughlin, Esq., Edward F. Treadwell, Esq., and Colin C. Kelley, Esq.

For Defendants: Hon. Edmund G. Brown, Attorney General of the State of California, by Richard H. Perry, Deputy Attorney General.

For Intervenors: J. T. Phelps, Esq., O. D. Ozment, Esq., C. Elmer Collett, Esq.

[fol. 232] Colloquy Between Court and Counsel

The Clerk: United Airlines vs. Public Utilities Commission of the State of California, et al. Complaint for declaratory relief and injunction, motion to dismiss, motion for leave to intervene, hearing before a three-judge court composed of Hon. Judges William E. Orr, Edward P. Murphy, and Louis E. Goodman.

Will respective counsel please state their appearances for the record?

Mr. Treadwell: Edward F. Treadwell, for the plaintiffs.

The Clerk: Any other counsel representing the plaintiffs present?

Mr. Treadwell: Mr. Kelley is with me, and my partner, Mr. Laughlin.

The Clerk: Counsel for Intervenors?

Mr. Collett: If the Court please, may I introduce to the Court Mr. O. D. Ozment, of the General Counsel's office of the Civil Aeronautics Board, who is admitted to the District Court, District of Columbia; to the Supreme Court of the United States; and the Court of Appeals for the Ninth Circuit, who will appear on behalf of the Intervenors, the Civil Aeronautics Board.

The Clerk: Counsel for the defendants?

Mr. Phelps: I am J. T. Phelps. I appear on behalf of [fol. 233] the defendants except Edmund G. Brown, the Attorney General of the State of California.

Mr. Perry: Richard H. Perry, Deputy Attorney General, appearing solely for the Hon. Edmund G. Brown, Attorney General of the State of California.

Judge Orr: I suppose the first matter you want to present, gentlemen, will be the motions to dismiss. We will hear you on the motions to dismiss.

Mr. Collett: If the Court please, may I suggest the motion on behalf of the intervenor be considered by the Court first?

Judge Orr: If the motion to dismiss is upheld, there will be no reason for intervention, and I think we better determine the question of dismissal first.

Did you want to be heard on that motion to dismiss?

Mr. Ozment: I understand there will be no objection to our intervention in the case.

Judge Orr: If there will be no objection, the order may be entered. You may appear for that purpose.

Mr. Perry: If it please the Court, I must challenge counsel's statement. We are waiving absolutely no objections at this time, and if the Attorney General is held to answer, the Attorney General has not consented to the intervention.

Mr. Ozment: I am sorry, Your Honor; I was misinformed. I was under the impression there would be no [fol. 234] objection. I would like to be heard as to——

Judge Orr: We will hear you amicus.

Mr. Treadwell: If Your Honors please, possibly it might be that Your Honors would like to make some arrangement in regard to briefs. The present situation is this, Your Honors, we on behalf of plaintiffs have prepared and are ready to deliver to the Court the brief on behalf of the plaintiffs. This morning, however, the defendants filed briefs which we had not seen before, and I don't know whether they wish leave to file further briefs or not. But if they do, we would like to have the right to reply to any briefs filed today.

Judge Orr: Do you want to submit this matter on oral argument, the motion?

Mr. Treadwell: Well now, we feel the briefs are necessary. It is too complicated to cover entirely in oral argu-

ment. We think oral argument would be very valuable to the Court.

Judge Orr: We might suggest, Mr. Treadwell, that we hear your oral argument. If we then determine that briefs are necessary, we will so advise you.

Mr. Treadwell: I think that is a good idea.

Judge Orr: We will hear, I suppose, which of you gentlemen—which of you gentlemen want to argue?

Mr. Perry: If it please the Court, the Attorney General [fol. 235] will defer to the Public Utilities Commission at this time in that their motion goes to the merits of the case, and of course, ours then would be ancillary should their motion be sustained.

Judge Orr: We will hear you then.

Mr. Phelps: May it please the Court, I understand in accordance with Your Honors' direction that we are to address ourselves at the present time to the grounds of defendants' motion to dismiss.

Judge Orr: I suppose that is the only thing before us, isn't it? There is no answer here or anything of that kind. About the only thing before us at this time is the motion to dismiss.

Mr. Phelps: My view has been that there was also present and before the Court the plaintiffs' application for a temporary injunction pendente lite and that was one of the two issues present and before the Court this morning.

Mr. Treadwell: It is not entirely clear to us, Your Honors, that we shouldn't have the opening, because the question on the temporary injunction presents the whole case.

Judge Orr: Supposing we are confronted after this argument with a motion to dismiss. Then there would be no question of any temporary injunction or any other proceeding.

Mr. Treadwell: That is right.

[fol. 236] Judge Orr: I thought perhaps the first thing we would have to get out of the way is this motion to dismiss.

Mr. Treadwell: Any way, any way that Your Honor wishes to present it. It just kind of seems to me that you

couldn't present a motion to dismiss without arguing the entire case, and I think that is what their argument will be.

Judge Orr: It may reach those proportions. It is just a matter of proceeding that we are now confronted with.

Mr. Phelps: I have prepared, Your Honor, a memorandum of points and authorities in support of this motion to strike. I am prepared to make it available to the Court now—that is, if you wish, or I shall defer it.

Judge Orr: It may be helpful in assisting us in following your argument.

Mr. Phelps: I think it may be helpful to make it available now.

ARGUMENT BY MR. PHELPS FOR DEFENDANTS OTHER THAN ATTORNEY GENERAL OF CALIFORNIA

The defendants whom I represent, if the Court please, have set out in their motion to dismiss three grounds upon which it is our position this complaint should be dismissed. The first ground states that the action should be dismissed because this Court lacks jurisdiction of the subject matter for the reason that there exists an adequate remedy in the courts of the State of California for the purpose of reviewing any action that may be taken by the Public Utilities Commission of the State of California or its attorneys or [fol. 237] representatives to enforce any penalties that may be provided by the laws of the State of California, or to enforce compliance with any order of said Utilities Commission pertaining to the subject matter of the above entitled action.

It was our purpose in stating that ground to rely upon the authority of two cases decided by the Supreme Court of the United States. They were related matters and they are contained in Alabama Public Service Commission vs. Southern Railway, and Alabama—the same two parties in both cases, the first citation being 341 US 363, and the second one being at 341 US 341. In that case the Southern Railway had applied to the Public Service Commission of the State of Alabama requesting permission to discontinue

certain local runs by its trains in the State of Alabama. The reasons for the application were those two lines were losing money, operating at deficits, and were therefore a burden upon interstate commerce.

The Public Service Commission of the State of Alabama declined to authorize the abandonment of those two runs, those two trains. Whereupon the railroad filed an action in the District Court, United States District Court in Alabama, requesting that the Public Service Commission of Alabama be restrained from enforcing certain penalty actions that were provided for by the statutes of the State of [fol. 238] Alabama.

So far the two matters are on all fours, it is precisely what the plaintiffs allege what these defendants do here.

The District Court granted the injunction and upon appeal to the Supreme Court of the United States that ruling was reversed. The Supreme Court of the United States held that there being an adequate remedy in the courts of the State of Alabama that the Federal courts should not exercise their jurisdiction, if there was such jurisdiction. The court was not altogether clear, not perfectly clear, may I say, on the question of whether or not the Federal court had jurisdiction. But it took the position that assuming that it did have jurisdiction, such jurisdiction should not be exercised. They referred to a matter of comity, that it was undesirable for the Federal court to interfere in a matter of this kind when the plaintiff had a perfectly adequate remedy in the courts of the State, and by pursuing its remedies through the hierarchy of courts in the State they could ultimately obtain review of the matters involved by the Supreme Court of the United States.

And so the injunction that was issued in that case was reversed, vacated.

It is our contention that this case is virtually identical with that one. Here we have a plaintiff, two plaintiffs, alleging that a regulatory body of the State of California [fol. 239] has threatened to commence penalty actions in the courts of the State of California. They allege that there is no adequate remedy available to them in the courts of the State of California and they seek the injunctive relief of this Court together with declaratory relief re-

questing that this Court adjudicate and adjudge that the Public Utilities Commission has no jurisdiction over this flight of aircraft from Los Angeles to Santa Catalina Island.

This Court, however, can take judicial notice of the fact that there exists in the State of California a system of courts, and I refer particularly to Article VI, Sections 1, 4, 4(a), (b) and (c) of the California Constitution. Those references do not appear in our briefs, Your Honor.

Judge Orr: They do not?

Mr. Phelps: They do not, no. It is Article VI, Sections 1, 4, 4(a), 4(b) and 4(c) of the California Constitution. In those sections will be found provisions creating the judicial department of the State of California, from the Superior Courts through the District Courts of Appeal and the Supreme Court.

We have cited in our brief the cases. I refer now to page 7, line 21, the case of Wilmington Transportation Company vs. Railroad Commission 236 US 151. That case is an example of the manner in which a public utility or a public transportation company can obtain judicial review of any [fol. 240] decision entered, or any rule or regulation promulgated by the Public Utilities Commission of the State of California.

The other case I have in mind appears at page 4 at line 22. The plaintiff, United Air Lines, one of the two plaintiffs involved here, has already been to the United States Supreme Court, having taken along with it the Public Utilities Commission, for the purpose of determining whether or not the Commission had jurisdiction over the intra-state affairs of United Air Lines. It was finally determined that the Commission did have such jurisdiction. I cite that case at this point for the purpose only of showing that the method is afforded for these plaintiffs to reach the United States Supreme Court for the purpose of reviewing any action that may be taken by the Public Utilities Commission.

Having that in mind, I refer once more to the cases I first cited, the Alabama Public Service Commission cases, to the effect that where such remedies are provided by the State that the Federal courts should not interfere or restrain the action of the local regulatory body.

Judge Goodman: Does the complaint in this case allege any grounds for equitable relief, that is, irreparable damage of any kind?

Mr. Phelps: Yes, sir, Your Honor, it does.

Judge Goodman: What is the nature of that allegation? Does that allege any facts that constitute the kind of [fol. 241] irreparable damage that would warrant a position of equity?

Mr. Phelps: I will be glad to answer that now, if Your Honor chooses. I had thought I would address myself to that question when the Court considered the question of whether or not the temporary injunction should be granted. But I will answer it now.

Judge Goodman: No, I am thinking of it in the terms of a motion to dismiss, whether or not the complaint sets forth a cause of action for equitable relief by a court convened under the provision of the Federal statute that is here pronounced.

Mr. Phelps: The complaint, Your Honor, does contain allegations of irreparable damage to these plaintiffs in the event that this Court does not intervene. The irreparable damage is variously stated, and I shall have more to say about it later. In substance it is alleged that the defendants have threatened to bring numerous penalty actions against these plaintiffs in various courts of the State, that they have claimed that they have authority to wait until penalties in the sum of $2,000 per day had accumulated to the extent of millions of dollars and that the defendants have asserted that the plaintiffs and all of their employees are subject to criminal prosecutions—I think it being intended to imply that the defendants have threatened to bring such criminal actions.

[fol. 242] Judge Goodman: Well, of course, the bringing of a multiplicity of suits is not within the—what is known as irreparable damage. What I mean, you have to defend more than one suit.

Mr. Phelps: I agree, Your Honor.

Judge Goodman: But I am trying to find out what it is in the complaint, what irreparable damage is alleged in the complaint. I take it from what you just said and from the authorities you cited that you are contending that the

motion to dismiss should be granted because of the fact that there is no sufficient allegation that would warrant the Federal court to intervene.

Mr. Phelps: Well, a part of our position, Your Honor, most certainly is that there is no irreparable damage here that will follow to this plaintiff in the event that this Court denies relief.

Judge Orr: The accumulation of penalties of two thousand a day would amount to irreparable damage eventually, wouldn't it, if that were true?

Mr. Phelps: There is a one-year statute of limitations, Your Honor, prohibiting the bringing of actions for penalties after one year from the time.

Judge Orr: Would that mean a penalty which might—or continuing offenses each day that they operate without this——

Mr. Phelps: That is correct, the statute so provides.

[fol. 243] Judge Orr: The one-year statute, a violation a day, it would be a continuous procession of violations which the statute of limitations would effect one year from now, is that the idea?

Mr. Phelps: Yes, Your Honor.

Judge Orr: So that by the time the first statute of limitations ran, why, a rather sizeable amount of money in the way of penalties would have accrued.

Mr. Phelps: That is true, Your Honor, assuming the amount granted was the maximum of $2,000. The statute does not fix $2,000 as the only sum. There is a range of $500 per day to $2,000.

Judge Orr: The allegation of the complaint is that it is $2,000.

Mr. Phelps: Yes.

Judge Orr: On your motion to dismiss is that to be taken as true?

Mr. Phelps: No, indeed, Your Honor, and that is one point I wish to comment upon. We do not wish in any sense for our motion to *be* dismiss to be considered in the nature of a demurrer. On the contrary, if these defendants, whom I represent, should be called upon to answer this complaint, which I hope they will not, we will most vigor-

ously deny most of the allegations contained in this complaint.

Judge Orr: Well, I know. It isn't a question of what [fol. 244] you want. It is a question of what the legal effect of your motion to dismiss is. Does that have the effect of admitting all of the allegations pleaded?

Mr. Phelps: I submit, Your Honor, it does not.

Judge Orr: You may proceed.

Mr. Phelps: Have I answered your question sufficiently, Judge Goodman?

Judge Goodman: Well, it is not quite clear to me yet. I am not aware of the extent, the limits of the proceeding under this statute under which this three judge court is summoned. It isn't enough merely to allege that a statute is sought to be enforced that is unconstitutional. That does not alone give the right to proceed here. An equitable showing must also be made, because a statute may be unconstitutional and admittedly so, still no right of action exists, or at least in a three judge court, unless an equitable showing is made.

Mr. Phelps: I agree entirely.

Judge Goodman: Because the unconstitutional point, the point of unconstitutionality, may be urged in a legal proceeding as well as in an equitable proceeding. Therefore, the most important thing is, I think, overlooked frequently in these cases, that there must be an allegation that justifies equitable relief by way of injunction.

Mr. Phelps: I agree entirely.

[fol. 245] Judge Goodman: That is prompted my inquiry as to whether or not at this stage of the proceeding with the motion to dismiss before this court as to whether or not there is or is not a sufficient allegation upon which the plea for an injunction may be sustained.

Mr. Phelps: Well, I am forced to say, Your Honor, that the complaint on its face does not contain allegations of the nature I have described. Certainly not——

Judge Goodman: Of course, the complaint says that the plaintiff will suffer irreparable damage. But out of the facts, it seems to me that the important question on the motion to dismiss is whether the facts alleged in the complaint are sufficient to show irreparable damage. That

I think is really, in my opinion, the most important question on the motion to dismiss. The mere fact that there is an allegation that there will be a multiplicity of suits in itself is not any basis in an application for injunction to a three judge court for an injunction, because if there is adequate relief that can be afforded at law, whether it is one suit or more than one suit, it seems to me that would be a primary consideration. So the question as to whether or not the mere fact the defendant will be sued for money, that is, the plaintiff will be sued for money penalty, is not in itself possibly a sufficient allegation of irreparable damage. Most of the cases in that field are cases where [fol. 246] property is about to be taken and where the injunction is sought because there will be irreparable damage because of the taking of property. But a mere suit for money can be defended as well as any other suit.

What is the element of the irreparable damage? That is what has appealed to me as being the most important consideration on a motion to dismiss.

Mr. Phelps: Well, I cannot say, Your Honor, what the further considerations are that would justify the granting of this equitable relief. I don't think they exist myself. I assume the plaintiff will have something further to say about that.

Now perhaps I don't understand you clearly, Your Honor. I don't believe that you intended to say that the defendants have the burden of showing——

Judge Goodman: Oh, no. I think that some of the argument that you made and the cases which you cite really go to the merits as to whether or not the state and federal government has jurisdiction here. It is not involved in the motion to dismiss. The motion to dismiss only really goes to whether or not there is a sufficient showing in the complaint to warrant the three judge court acting in equity. That is all I was directing your attention to, to see what your argument was on the motion to dismiss in that regard.

Mr. Phelps: Well, I think, Your Honor, that it will [fol. 247] appear that there is no ground for equitable relief here and that therefore the principle of the cases I have just cited is applicable, namely, to the effect that the Federal District Courts do not entertain an action of this kind

to restrain or interfere with the exercise of the regulatory power of the Commission.

The second ground set out by these defendants in their motion to dismiss is the ground that the plaintiffs have not exhausted their administrative remedy which is available to them for the purpose of correcting any erroneous order that may be issued by said Public Utilities Commission pertaining to the subject matter of the above entitled action.

That ground was set out to take care of the possibility that the complaint might be construed or interpreted to allege that the defendant Commission was contemplating the taking of certain administrative action as distinguished from an action commenced in the courts to enforce penalties. For example, the complaint refers on page 6, commencing at line 23, that the defendants claim that the Public Utilities Act authorized the defendants to bring numerous suits for so-called reparations. I am not sure just what that is intended to say. But it is true that the Public Utilities Act enacted by the Legislature of the State of California empowers the Commission to hear and de- [fol. 248] termine suits for reparation, and it was in view of the possibility that it was that kind of action which these plaintiffs were seeking to restrain, in addition to the other kind of action, that we set out as ground number two the fact that if that is comprehended in the complaint they have not exhausted their administrative remedy.

And there are cases cited in our brief to support the proposition——

Judge Orr: Before the California Commission, you mean?

Mr. Phelps: Yes, Your Honor.

Judge Orr: Why would they be required to do that, if the California Commission has no jurisdiction?

Mr. Phelps: If it be assumed at the outset the Commission has no jurisdiction, I suppose the answer is: there is no reason.

Judge Orr: I suppose that is one of the things upon which this is based, that they have no jurisdiction.

Mr. Phelps: That is correct. I think I need not comment further upon the second ground, standing upon the cases cited in our brief for that proposition.

The third ground is far more reaching, and it is here that we have attempted to maintain that this action should be dismissed because on the merits this court has no jurisdiction for the reason that the subject matter, namely, this flight from Los Angeles to Santa Catalina Island is within [fol. 249] the jurisdiction of the State of California and not of the Civil Aeronautics Board.

That is a complex matter, Your Honors. The act of Congress which is involved here is a complex piece of legislation. It requires the reading of a good part of that statute to understand the full import. Our position is, and I think I better state this part of my argument by referring to the pertinent language of the Civil Aeronautics Act. A portion of it is set out in the complaint on page 4, commencing at line 2. The Act to which I refer is contained in 49 US Code Annotated at Sections 401 et seq. There are numerous provisions. It is a comprehensive piece of legislation. It is our position that the Congress in enacting that statute, among other things, had two distinct matters in mind. One of them was the desirability and the necessity of regulating the navigation and the safety of aircraft flying within boundaries of the United States and over water to other countries and to its territories, but it was focusing its attention at this point upon safety and navigation.

A second aspect, which we maintain Congress considered as part of the subject matter, was transportation, and Congress handled in quite two different ways. In the case of the former, navigation and safety, it was considered important, if not imperative, that the Civil Aeronautics [fol. 250] Board be given complete jurisdiction over the entire field in order to secure uniformity of regulations. That is quite understandable in the case of safety and navigation. But for purposes of transportation by aircraft, both of passengers and property, I think it will appear from a careful reading of this Act Congress was careful to leave to the states the regulation of the affairs for the intrastate operations of aircraft.

That was the position that the Commission maintained formerly, a position which was reviewed by the Supreme Court of the State of California and ultimately by the

Supreme Court of the United States, and that is the view that was affirmed by that decision in the case which — have already referred to, and which is cited in page 4 of our brief involving one of these very plaintiffs, United Air Lines.

So it is our position that there can be no longer any doubt whatever that the Civil Aeronautics Act has left to the states jurisdiction over intrastate operations of aircraft for the purposes of regulating and fixing fares and some other matters—for the present purpose, fares.

Judge Orr: What else do they allege that you are trying to do other than that, if anything, other than the regulation—fixing and regulation of fares?

Mr. Phelps: I think, your Honor, I am correct in saying that there is nothing beyond that at the present time, that [fol. 251] the criticism of the plaintiffs of the Commission is that the Commission is seeking in effect to regulate fares for this run from Los Angeles to Santa Catalina Island.

Judge Orr: And you say that the United States Supreme Court has said that the State of California has the right to do that?

Mr. Phelps: Yes, your Honor.

Judge Orr: What are we left here with then?

Mr. Phelps: If I may go on, Your Honor, I think I can make it clear what I have in mind. The subject matter involved in the litigation which I have described and which culminated in the United States Supreme Court involved flights of aircraft between Los Angeles and San Francisco. That was considered, as I say, Intrastate and the Commission was given full authority to regulate those fares. Now we have this question coming up in this proceeding involving the flight of aircraft from Los Angeles to Santa Catalina Island over the waters intervening between those two points, and it is the position of the plaintiffs, as I understand it, that that makes the case different from the case that has been decided by the Supreme Court, and they rely upon certain language contained in the Civil Aeronautics Act, a portion of which is set out on page 4 of the complaint. They have cited several sections of the Civil Aeronautics Act, several of which I maintain are not material.

[fol. 252] For example, Section 49 USCA, Section 401, subsection 20(a) "Defines interstate, overseas and foreign air commerce to mean" certain things—I am referring now to line 7, page 4 of the complaint. I think a reading of the Act will disclose that in using the word "commerce" Congress was referring to this deal of the regulation of safety in navigation to which I have already referred and that the pertinent language is to be found in Section 49 USCA Section 401 subsection 21(a), which commences at line 11 of the complaint, and which defines interstate, overseas, and foreign air transportation to mean the carriage by aircraft of persons or property between places in the same state of the United States through the airspace over any place outside thereof.

It is the position of the plaintiffs, as I understand it, that a portion of this flight being over the waters between the mainland and the island brings that flight within the definition described on page 4 which I have just read, and they rely upon the phrase, I am sure, "any place outside thereof." It is their position, I believe, that the waters between the mainland and Santa Catalina Island are a place outside California.

If that language is interpreted with the strictest literalness, perhaps that result would follow. But it is our position that the language of this statute and other [fol. 253] statutes, particularly, though, we are dealing with the statutes enacted by Congress to implement the commerce laws, that they must be interpreted in the light of the reason for the regulation.

It is our position that this phrase "outside thereof" was intended by Congress to take care of situations along the Canadian and Mexican borders and perhaps elsewhere, where a flight of aircraft would take place commencing at one point in a given state, going outside over Canada or Mexico or perhaps other places, (by other places I mean places that are under the jurisdiction of another state or another jurisdiction), and passing then back into the first state. Under those circumstances it makes sense that in the interest of uniformity of regulation Congress saw fit to give that power to the Civil Aeronautics Board. But the reason for that rule does not obtain here.

Here we have a flight commencing in Los Angeles, in California, over water, which is, I maintain, territorial waters of the United States. It is not another state within the meaning of this definition, another state of the Union, it is not a foreign country, and there is no reason why the rule should attain.

Judge Orr: Is Santa Catalina Island a part of some county in the State?

Mr. Phelps: It is part of the State of California, Your [fol. 254] Honor. Of that I am certain. I believe it is also a part of the County of Los Angeles, but I am not positive of that.

And so, as I say, the reason for uniformity of regulation does not attain here. There is no possible conflict with any other state or any other foreign country, where this flight takes place simply over a reach of water, though, terminating back in California.

And so it is our position, and I think in reading my brief the Court will find the position to be well taken, that the phrase "outside of" interpreted not with absolute literalness but in the light of the meaning, the purpose, the rationale of the regulation, should be read as if it read "outside in another state or outside in a foreign country or territory."

It is a well-known principle, has been frequently announced by the Supreme Court of the United States, that——

Judge Goodman: According to your reasoning then, the plaintiffs would have a right, in an airplane going from San Francisco to Los Angeles but going out, as they sometimes do, over the water, over the Pacific Ocean, for some distance, would be subject to Federal regulation on the theory that that is a place outside the state?

Mr. Phelps: It might follow, Your Honor. That would [fol. 255] certainly be ridiculous, and I think this is equally ridiculous.

Judge Goodman: I asked that because I recall having made one or two flights from San Francisco to Los Angeles, where we went over the ocean for some distance.

Mr. Phelps: I think that they do that frequently, Your Honor.

Judge Orr: I suppose there is a question whether that is the regular route, that is they have regular flights, I wonder if that is the regular route that they have laid out or maybe they go out that way just on an occasion for some particular reason.

Mr. Phelps: That I cannot answer, Your Honor. I don't know whether or not the regular route is over the water or not between Los Angeles and San Francisco. But certainly it might well be feasible and it may often happen, as you suggest, that by virtue of exigencies of weather or otherwise it would be better to divert the flight over the open waters, and it may even be that a regular route has been fixed over the waters. But that is a sheer incident, it has no significance whatever for the purposes of regulating fares here. It is where the flight impinges upon another jurisdiction with the result of the possibility of conflicts in jurisdiction. That is what Congress was seeking to do, seeking to comprehend and to mitigate and prevent in [fol. 256] enacting this legislation.

Judge Orr: You think that in the sense that where the state would have control would differentiate from where the United States would have control—where the United States would have control over these waters, the control of California ceases, doesn't it? And that becomes, whatever jurisdiction be asserted there, is the jurisdiction of the United States.

Mr. Phelps: For certain purposes, Your Honor. It seems to me that in every case you must determine what purposes are being sought to be accomplished. Now I would agree——

Judge Orr: Well, has the State of California any jurisdiction there over those waters? Certainly they would not have, if the flight occurred from one point in California to another point in California, but going through another state—during the time that they were in the other state, California's jurisdiction would cease. Here after they leave the mainland does their jurisdiction cease until they again land in Santa Catalina?

Mr. Phelps: I see no reason why it should, Your Honor, no reason whatever why it should cease.

Judge Orr: Other than in the air over the waters where — is no control by California.

Mr. Phelps: I would not go so far, Your Honor, as to [fol. 257] say no control by California in such sweeping terms as that. I don't think I need to go that far. It may be that for certain local limited purposes California has jurisdiction over those waters. I can imagine, for example, and I think I am correct in saying, that operating out of many ports along the coast of California there are operations by local water taxies which in numerous cases go outside the traditional three-mile limit, and I think I am correct in saying that California has exercised jurisdiction over that kind of operation, and there are cases to the effect that states may exercise jurisdiction over pilot service, at least until the Federal Government has clearly and in unequivocal terms ousted that jurisdiction.

Judge Orr: Would the United States Government have the right to occupy that field, could they constitutionally do so?

Mr. Phelps: I think, Your Honor, they probably could, but my position is that they have not.

Judge Orr: I think that is the situation with which we are confronted. We must decide whether they have or not, is that the idea?

Mr. Phelps: Yes, but this legislation to which I have referred——

Judge Goodman: Do you think there is any other basis in this Section than one of jurisdiction? What other reason [fol. 258] would the United States have for—would Congress have had for stating in the statute that they had jurisdiction over any place outside thereof except on the jurisdictional basis? What other motive would there be for that?

Mr. Phelps: I think they did have, Your Honor, in mind the question of conflicts of jurisdiction, but of the kind that I have referred to a moment ago, conflict with another jurisdiction, like Canada, Mexico, or another State of the Union, and not in a case like this where there is no such conflict.

Judge Goodman: In other words, it is a different situation than if an aircraft went from California, from one

point in California, to another point in California, but went over Nevada?

Mr. Phelps: Quite.

Judge Goodman: There the Federal Government would not have jurisdiction over Nevada because it would still be a state jurisdiction, so it must be something else—there must be something else to the reason for this except the mere fact that it is a place within the jurisdiction of the United States. Do I make myself clear?

Mr. Phelps: I think I understand, Your Honor. There is no doubt—I concede——

Judge Orr: Other than there is no other agency over the waters to exercise jurisdiction other than the United [fol. 259] States. Is that true?

Mr. Phelps: May I answer your question this way, Your Honor.

Judge Orr: Yes.

Mr. Phelps: In the use of this phrase "outside thereof" which is a critical phrase, it is our position that Congress had clearly in mind these situations along the Canadian, Mexican borders, "outside thereof" meaning outside a given particular state, contemplating a flight from a point in one state outside thereof, through Canada or Mexico, back into the same state. Now that, we maintain, was the reason, the rationale, the basis for that language.

Judge Goodman: Would that equally apply, though, if the route went over another state, not necessarily a foreign country but a separate state?

Mr. Phelps: Yes, and there is a separate clause in the Act which expressly covers that very situation. So there is no question about it. We concede freely that if an aircraft commences in California, flies over another state such as Nevada, comes back into California, the Civil Aeronautics Board has jurisdiction. There is no doubt about that. But that is not this case.

Judge Orr: You say the regulation only goes to the question of fare—is that the idea, the fares, the tariffs that can be charged in California?

[fol. 260] Mr. Phelps: For present purposes, it is fares that are involved.

Judge Orr: I am asking that question with this thought in mind, if that were the only thing that California could exercise jurisdiction on—I mean on the question of the fares that might be charged, why would there be any reason for the United States to occupy that field? I can well see on the question of safety regulations or something of that kind, they might be required to step into — regulate or make the flights over water safe. There may be a difference between those situations. But I don't — why would they want to occupy the field to the extent of prescribing the fares. That would be on a ground of having regulated in one respect they should take over in all respects. They couldn't disassociate the two very well.

Mr. Phelps: I don't think Congress had that in mind, Your Honor, because I think it appears from a reading of the Act that they had differentiated sharply between those two separate aspects of the situation, transportation on one hand and safety on the other. The Supreme Court of the United States has frequently stated that where we have a question involved of the possible conflict of jurisdiction between states and the Federal authority that the Federal Legislature upon a given subject matter must be clear and unequivocally wholly free from ambiguity before state [fol. 261] authority will be superseded.

Judge Goodman: May I interrupt you and ask one more question to get this clear in my mind. It is your contention that if in a flight between two points in California where the airplane passes over Nevada that the only basis for jurisdiction of the Federal Government there is with respect to the regulation of the aircraft rather than the regulation of rates?

Mr. Phelps: Both.

Judge Goodman: What?

Mr. Phelps: Both.

Judge Goodman: Would there be any more reason for the Congress wanting to regulate the rates in a case where an airplane went from one point in California to another point part of the way over another state any more so than in the case where it went from San Francisco to Los Angeles and over a part of the water, the Pacific Ocean; what is the difference there?

Mr. Phelps: I think I see your point, that there isn't. I think I may have misled you by focusing and emphasizing unnecessarily the matter of routes and fares. That is what we have involved here, but when I say that—when I referred to transportation a moment ago as one aspect of regulation which the Congress had in mind, I did not mean to confine it to rates. There are other aspects of the [fol. 262] regulation of transportation other than rates which may be involved. For example, the issuance of operating authority. It is not confined merely to rates, and there are, I am sure, other matters than rates which are considered as being involved in the concept of regulation of transportation as distinct from regulation of safety in navigation, and it is in view of the desire of uniformity of regulation of transportation in all of its aspects where it goes over another state or goes over into a foreign country that Congress thought it was desirable to have uniformity. But the important thing, it seems to me, is the flight over a conflicting jurisdiction.

Judge Goodman: Naturally, that is the basis of your argument.

Mr. Phelps: Yes, and I maintain there is no conflict in jurisdiction over which this aircraft travels.

Judge Orr: Is it conflicting jurisdictions as relates to foreign government and other states——

Mr. Phelps: Yes, Your Honor.

Judge Orr: Not between the United States and a state?

Mr. Phelps: No. Now, our position is then that this legislation, considering its purpose, its reason and its objectives, has not clearly, unequivocally divested the state of California of its jurisdiction over this operation. In our brief we have referred to a number of cases of the [fol. 263] United States Supreme Court which I think will support that proposition. I think that is all, Your Honors, I have to say upon this phase of the matter. I will have something more to say if the time should come upon the question of whether or not a temporary injunction should be issued.

Thank you.

ARGUMENT BY MR. PERRY FOR DEFENDANT ATTORNEY GENERAL OF CALIFORNIA

Mr. Perry: May it please the Court, there is in the State of California one law which confers jurisdiction upon the Attorney General of the State of California to appear on behalf of the Public Utilities Commission. The Public Utilities Code of the State of California, Section 2101, reads as follows:

> "The Commission shall see that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that the violations thereof are promptly prosecuted and penalties due the State therefor recovered and collected, and to this end it may sue in the name of the People of the State of California. Upon the request of the Commission, the Attorney General or the District Attorney of the proper county or city and county shall aid in any investigation, hearing, or trial had under the pro-
> [fol. 264] visions of this part, and shall institute and prosecute actions or proceedings for the enforcement of the provisions of the Constitution and statutes of this State"—

with an omission, which I need not read, at the end of the Section.

Primarily, if it please the Court, I am appearing solely on the ground of the jurisdiction over the person of the Attorney General. If the Court should hold that our motion is at this time improper I will at that time request leave of Court to file appropriate pleadings in this matter on the merits or answer such questions as the Court may wish to direct without any waiver of the limitations of our attack upon the pleadings at this time.

I allude now, if it please the Court, to the complaint in the within action, page 5 thereof and commencing on line 21, or for purpose of clarity perhaps, if it please the Court, we should begin at line 18:

". . . plaintiffs allege that unless the same are so filed, the said Public Utilities Commission and the members thereof will so direct its legal advisers, namely, the defendants Edmund G. Brown, Attorney General of the State of California . . ."

That, if it please the Court, is the only reference in [fol. 265] that complaint to the Attorney General of the State of California. There is no pleading that the Attorney General has been requested by the Commission to act. There is no allegation and there cannot be any such allegation under the law of the State of California that the Attorney General threatens to act on his own motion, for he has no such power. Public utilities are specifically within the jurisdiction of the Public Utilities Commission unless there is some statute derogating therefrom.

Therefore, as we see it, there is absolutely no pleading of any case, legal or equitable or otherwise or any controversy, legal or equitable, against the Attorney General of the State of California.

There is an attempt to obtain the declaratory relief and injunction in prospective that perhaps some day the Commission may ask the Attorney General to appear as its legal adviser, an injunction perhaps, you might say, to the Attorney General to restrain him from appearing as counsel for the Public Utilities Commission. A novel theory of the law.

Perhaps the Attorney General as a defendant was included only by reason of an excess of caution. But then, if that be the case, if it please the Court, we submit that the District Attorney of each and every county in which the United Air Lines has an office should also have been [fol. 266] included, for it is in the alternative the Commission may request either the Attorney General or any District Attorney.

As a matter of fact, it isn't pleaded that any District Attorney has been requested by the Public Utilities Commission to appear any more than has the Attorney General.

We therefore submit, as to the first ground of the motion to dismiss, that there is not one word in the complaint which states any cause of action whatsoever against the Attorney General of the State of California.

Judge Orr: If the Commission was enjoined from proceeding, that would tie the hands of the Attorney General.

Mr. Perry: That is correct, because, if it please the Court, if the Commission were enjoined, to ask the Attorney General to prosecute an action would be a contempt of court. It would be an action by the Commission, not by the Attorney General.

As to the second point, it follows, we say there is no case or controversy pleaded at all. Therefore, of course, there is no pleading within the jurisdictional amount of this honorable court. There is no pleading that there is any amount in controversy between the plaintiffs and this defendant in excess of $3,000 or any other sum. There is no irreparable damage pleaded, as against the Attorney General, there is no specific—there is no general damage [fol. 267] pleaded as against the Attorney General, for it is not pleaded, as I have heretofore alluded, that he has threatened to do, proposes to do or has done any act inimical to these plaintiffs.

As to the third cause of action, or, I should say, the third ground, if it please the Court, for the motion to dismiss, aver that this Court lacks jurisdiction over the person of the defendant in that it has not been pleaded that we have threatened to do any act against the plaintiffs.

I believe that my previous remarks have clearly illustrated that point to the Court. I will not dwell further upon the third and specific ground for moving to dismiss the within proceeding both as to the complaint for declaratory relief and as to the motion for preliminary injunction. We take it also, if it please the Court, that the injunction pendente lite should be quashed as of the granting of a motion to dismiss this defendant.

If the Court has any inquiry, we shall be most happy to oblige, if we can.

ARGUMENT BY MR. TREADWELL FOR PLAINTIFFS

Mr. Treadwell: If Your Honors please, at this time we ask the Court to permit us to file with the Clerk our brief which we have prepared, which covers the motions to dismiss as well as the application for temporary injunction. We have also prepared the form of the order which we

request, temporary injunction, and we ask leave to deposit [fol. 268] that with the Clerk.

We have also prepared a surety bond in the sum of $2,000. We also ask leave to deposit that with the Clerk.

Judge Orr: The order may be entered.

Mr. Treadwell: If Your Honors please, this is a case of considerable importance. That there should be at this time such a contest would itself indicate to Your Honors the irreparable nature of the injury to the plaintiff. The facts that appear in the complaint, which they are asking to dismiss, are that the State of California boundaries include the mainland of California and the mainland of Catalina Island, and a space of three miles around each of those, and no more.

This route runs from the mainland across that three-mile space and then entirely outside of the State of California runs over a space of 24 miles to Santa Catalina Island. In other words, the distance is thirty miles, but deducting three miles around the Island, three miles along the mainland, we have 24 miles where this route is day and night and at all times entirely outside the State of California.

It is interesting to note that when the original certificate of convenience and necessity was granted to the predecessor of the present plaintiffs, the Board pointed out that in all the litigation California had admitted that was the [fol. 269] situation, and that it had no jurisdiction over this part in regard to fishing and things of that kind.

Judge Orr: We were just discussing—I am not sure about the situation, but how far out from the mainland does the United States have jurisdiction? Is it 12 miles?

Mr. Treadwell: Three miles.

Mr. Ozment: If Your Honors please, if I may interrupt, the United States has asserted claim to ownership to the entire Continental Shelf, whatever that may be. I don't know whether the Continental Shelf runs in this particular area. In the tidelands case, of course, the United States Supreme Court held that the United States owns the three-mile marginal belt along the California coast, but did not make any comment as to the claim to the entire Continental Shelf.

Judge Orr: Over navigational waters what is the jurisdiction of the country, 12 miles from the shore?

Mr. Ozment: I think that is correct, Your Honor.

Mr. Phelps: May I interrupt, Your Honor? We have cited in our briefs a very recent case decided by the International Court of Justice which deals with the question involving the extent of territorial waters, and I think it will appear from that case that the term "territorial waters" is not the inflexible, rigid term that it once may have been considered, as being a band of three miles, but [fol. 270] is a flexible term which depends upon the circumstances in the given case, and in the case to which I refer as cited in our brief there was a band of waters off the coast of Norway up to 30, 40 miles, as I recall, that was considered a part of the territorial waters of Norway for certain purposes.

Mr. Treadwell: I didn't want to get into that, Your Honors, because it has been indicated that some times it may be the line is the distance that you can fire a gun or a cannon, and nowadays you can fire a cannon a good long ways. It might be that that rule applies. No one knows. It is a matter up in the air.

Judge Goodman: Of course the problem we were considering, Mr. Treadwell, is that here you have an island that is 24 miles out—did you say?

Mr. Treadwell: Yes, 30 miles out.

Judge Goodman: Thirty miles out, which is owned by the United States, so that the territorial waters of the United States would extend a certain distance in each direction from that Island as well as from the coastline of California.

Mr. Treadwell: That's right.

Judge Goodman: And the problem is what do you call the thirty-miles that is in between the two?

Judge Orr: Who has jurisdiction over that?

Mr. Treadwell: Over what?

[fol. 271] Judge Orr: That portion of the flight, the waters over which the flight takes place, which is not within the territorial jurisdiction of the United States?

Mr. Treadwell: Well, it is the Government of the International La . It has only decisions under international

laws and principles which govern. It does not have any Congress of anything of that kind, but it belongs to the nations and it is subject to the rules of international law. I think that is about all there is to say about the ocean.

Now, if Your Honors please, when this route was——

Judge Orr: Who fixed the rates on flights from United States to Hawaii?

Mr. Treadwell: I am not informed, Your Honor.

Mr. Ozment: The United States regulates those.

Judge Orr: Yes, sir.

Mr. Ozment: In every phase.

Mr. Treadwell: No doubt they do. But I just—I never had anything to do with it.

Now when this route was established——

Judge Goodman: Is that true as to the flights between California and Nevada?

Mr. Ozment: Yes, Your Honor, as to interstate transportation, yes.

Judge Goodman: The United States regulates that.

Judge Murphy: Who regulates that, the Civil Aeronautics [fol. 272] Board?

Mr. Ozment: Yes.

Judge Orr: Will you pardon these interruptions?

Mr. Treadwell: Surely.

Judge Orr: Who regulates the rates between New York City and England?

Mr. Ozment: There is a gap, Your Honor, in our Act. The Civil Aeronautics Board has jurisdiction to fix rates in interstate transportation. In overseas transportation, it has jurisdiction, but it has no power to fix rates in foreign air transportation. So those rates are unregulated except insofar as they are fixed by agreement between the carriers and approved by the Board.

Judge Orr: Here it is, and it may not be material, but there are about six or seven miles over which these flights take place in which the United States has no jurisdiction.

Mr. Ozment: Well——

Judge Orr: We will wait and get that straightened out later.

Mr. Ozment: Yes.

Mr. Treadwell: So I say the predecessors of the present plaintiffs, when they laid this route out, they went to the Civil Aeronautics Board to get their certificate of convenience and necessity, and they ruled distinctly that the route came within the language of Section 1 of the Act, [fol. 273] which was the one that counsel has read here and which we rely upon. So you had an administrative ruling by the people who were to enforce this law years ago when this application for a certificate of convenience and necessity was granted. Since that time all the rates have been filed with that Board as they are required to be.

Later, 1946, the company that was operating the route entered into an operating contract with United Air Lines. That was submitted to this Board, under this Act, and they approved that, and they provided in the order of proving it that if there was any change in rates they would be filed with the Board.

They were filed with the Board, they were approved, and according to the allegations of the complaint full control of the route has been in the Civil Aeronautics Board and not in the defendants.

Now after all of these years, six years since the granting of the approval of the contract with the United Air Lines and possibly for longer periods before that, nothing has been done of any kind in the control of the route by the California Public Utilities Commission, and even now they have filed,—made no order which could be reviewed or anything of that kind. They are just sending out threats, threatening to not only do that, to insist that the rates be filed with it, but to impose these penalties.

[fol. 274] It is true these penalties might be $500 a day instead of $2,000 a day, but our allegation is that they are going to claim a penalty of $2,000 a day and, as a matter of fact, they filed two suits in regard to another matter in which they claim $2,000 a day.

Mr. Phelps: Just a moment, please. I dislike very much to interrupt, counsel, but counsel is referring to suits brought by the defendant Commission, and I think we are entitled to have the best evidence of those suits, and the entire record of it. If counsel is prepared to offer that here, I would have no objection to it certainly.

Mr. Treadwell: I think you referred to it in your brief.

Judge Orr: What is this now that we are having the dispute about?

Mr. Treadwell: Well, counsel seems to think that it is somewhat important that the penalty might be less than for $2,000 a day.

Judge Orr: That is a matter that is alleged in the complaint and that is what we are considering. We are considering now the allegations of the complaint.

Mr. Treadwell: That's right.

Mr. Perry: May it please the Court, I too dislike interrupting, but counsel is not apparently arguing the motion to dismiss. It is arguing the motion for injunctive [fol. 275] relief. I suggest to the Court that if we are held to answer we would like to have time to file further pleading and be prepared to meet the case on the merits. If we may be permitted to make objections at this time without waiver, we would have no objection to doing so. But we think we should be accorded the opportunity to answer if the motion is to be heard entirely.

Judge Orr: I don't think there is any reason for alarm. The Court here won't consider anything except but what is before it.

Mr. Perry: Very well, Your Honor.

Mr. Phelps: Excuse me, Your Honor, I would just like to continue my interruption. I would like to be heard a little further. My objection was based upon the reference of counsel to the fact that the Commission had already brought suits against this plaintiff, United Air Lines.

Judge Orr: There is no allegation of that in the complaint, is there?

Mr. Phelps: There is not.

Judge Orr: Then we will not consider it.

Mr. Treadwell: The allegations of the complaint are that not only will they demand that these rates be filed with the Public Utilities Commission, but that they will authorize suit to recover penalties at the rate of $2,000 a day. Now, that amounts to $730,000 a year. Even if we can be pro- [fol. 276] tected by the statute of limitations, assuming that, there still would be a penalty of just that in one year of $730,000 of penalties which they claim.

Before this, Your Honors, long before this, the question had come up whether or not a ship line running from San Francisco out into the ocean and down to Los Angeles was an interstate operation. The Supreme Court of the United States in seven cases has held that it was a transaction in foreign commerce.

Judge Orr: That is where a portion of the route went over the waters?

Mr. Treadwell: It went from San Francisco out into the ocean and then down to Los Angeles.

Judge Orr: That is as an established route?

Mr. Treadwell: As a regular route. That was held in many cases, seven cases altogether, by the Supreme Court of the United States. It is true, Your Honors, that a later case in California refused to follow that decision, but, of course, they could not affect the decision of the Supreme Court of the United States, and the Supreme Court of the United States in that case did hold that it amounted to foreign commerce. And the reason for that was that they said that commerce does not mean just carrying goods. It includes intercourse between the states and between foreign countries and anybody that had the ships out on the ocean [fol. 277] there would be subject to the possible difficulties with foreign nations, and that made it foreign commerce, notwithstanding that they were not actually carrying any goods to a foreign country. And while I say there is a case in California that attempts to repudiate the decision of the Supreme Court of the United States, the Supreme Court of the United States has reversed them in every way, shape or manner, and it was in view of that, Your Honors, and they knew that when they passed this Act, and they used the language that they do in the Act in view of that.

I just want to read it to your Honors again, because it is on what we base—it defines interstate and foreign commerce.

Judge Orr: Are you reading from your brief?

Mr. Treadwell: Yes.

Judge Orr: What page?

Mr. Treadwell: Page 13.

It defines interstate or foreign air commerce to include transportation "between points within the same state, ter-

ritory or possession or the District of Columbia, but through the air space over any place outside thereof." Now "over anyplace outside thereof" if they wanted to limit it to some other state, as they could easily have said "some other state," but if they wanted to limit it to any country they [fol. 278] could have said "any country." But when they said "anyplace outside thereof" why, they cover the exact situation that we have here, namely, the part of the ocean that was outside of the state. They said that that was interstate and foreign commerce.

It defines interstate commerce to include "the carriage by aircraft of persons or property for compensation or hire between places in the same state of the United States through the airspace over anyplace outside thereof." Now there again they didn't say any state or any country outside thereof. They said "any place outside thereof," and as I say, the very people that purported to carry out this Act interpreted that as including this airline.

Then interstate air transportation to mean, "the carriage by aircraft of persons or property between places in the same state of the United States through the air space over any place outside thereof."

There they set them off. One of them including a place and the other one referring to this state. It shows you there is no justification for counsel's argument that this word "place" only includes states or countries or something of that kind.

So that makes three cases where Congress has shown an intent to control the air transportation beginning and ending within a single state but flying through the air space [fol. 279] over a place outside thereof.

That is the great question that Your Honors have got to pass upon here. That is the big question. The other questions in the case of procedure and things of that kind, and are very unimportant compared to the importance of knowing what this Act means and who has jurisdiction over this Line.

As I say, it is not only alleged in the complaint that they will impose or take the steps necessary to enforce the collection of these penalties of $2,000 but that they take the position and make the claim that they——

Judge Orr: It is our thought, Mr. Treadwell, that right now your job is to convince us that this is the proper forum to bring this action before.

Mr. Treadwell: Oh, yes, I will be glad to do that.

Judge Orr: We are more concerned about that right now than any other phase of the case.

Mr. Treadwell: Well now, the situation is this, Your Honor, on that: If the Public Utilities Commission had made some order which controls this route, undertook to control the route, there is no doubt that the proper procedure would be a writ of review from that order to the Supreme Court of the United States. That would be what would be the actual way to proceed, the way you could proceed.

But there is nothing of that kind here. There is no [fol. 280] order. We have waited now a minimum of six years, and probably much longer, according to the allegation of the complaint——

Judge Goodman: Suppose, Mr. Treadwell, the Public Utilities Commission, despite what you think it is going to do, never takes any action?

Mr. Treadwell: That's right.

Judge Goodman: Like the dog that barks and doesn't bite. What is the ground for the Federal Court intervening in the matter, unless in the absence of something more than merely some threat that they may want to regulate you, they may want to impose penalties on you, but there is no actual overt act yet.

Mr. Treadwell: Well, of course, we have alleged a threat to do it and that's exactly what was in the Young case, ex parte Young, by the Supreme Court of the United States. They said a threat to impose those penalties of such a nature as that——

Judge Murphy: But how has that been expressed? How has that threat been expressed?

Mr. Treadwell: That is a matter of proof. It has not been—I will say for fairness to the Court that it has not been expressed by an actual order. If it had been expressed by an actual order, why,——

Judge Orr: Isn't your position this, you are kind of [fol. 281] sitting in a kind of uneasy chair?

Mr. Treadwell: Yes.

Judge Orr: That you don't know exactly where you are?

Mr. Treadwell: Yes.

Judge Orr: That you have the Commission one side asserting jurisdiction, and you don't think that they should. However, you are not sure about that and each day that there is no determination, and this could be run for a considerable length of time, and in the meantime if it should be determined that they do have jurisdiction and that you have not complied, why, you would be subject to very heavy penalties?

Mr. Treadwell: That's right.

Judge Orr: You want to avoid that possibility. That is your situation, isn't it?

Mr. Treadwell: Yes, that is the situation.

Judge Goodman: Wouldn't your action be one for declaratory judgment?

Mr. Treadwell: We have asked for—That is what we have asked for.

Judge Goodman: But a three-judge court has no jurisdiction in a declaratory judgment action. It only has jurisdiction if the enforcement of the state statute is sought to be enjoined on the ground that the state statute is unconstitutional. Haven't you an adequate cause of action for a declaratory judgment in the capacity that you [fol. 282] bring suit in the Federal Court and assert the diversity of jurisdiction? You have got that. You have got the dispute against the enforcement of a state statute. Why can't you bring the ordinary action for declaratory judgment? You might even be entitled to relief by way of injunction in the declaratory relief action. But are you properly before a three-judge court?

Mr. Treadwell: Your Honor, we had some discussion about that at the time we filed the complaint and Your Honor thought possibly that jurisdiction of the three-judge court would only go to the question as to the constitutionality of the state statute. It was limited. We have shown in our brief, Your Honor, by numerous cases that when the three-judge court takes the case over, it takes the entire case over, and this is a case for declaratory relief.

Judge Goodman: You have to get into the three-judge court first. There is no doubt about that. That once it assumes jurisdiction——

Mr. Treadwell: A three-judge court is not difficult, Your Honor, because we allege the unconstitutionality of these penalties, and that really means something, Your Honors.

Judge Orr: Is it the unconstitutionality of the state statute or the misuse of the power vested in this Commission that you are alleging? You are saying that they are working under a state statute but they are assuming to mis- [fol. 283] use their power, assuming a jurisdiction which the state statute does not confer?

Mr. Treadwell: I don't think that is exactly what our allegations are.

Judge Orr: According to your theory they are threatening to interfere in a Federal field, in a field which has been taken over by the Federal authorities?

Mr. Treadwell: Well, if Your Honor please——

Judge Orr: It is the act of the individual, isn't it, rather than the unconstitutionality of the statute?

Mr. Treadwell: We make two points. In the first place we claim that they have no right to interfere with the route at all. They have no jurisdiction.

Judge Orr: Well, that is the act of the individual; I mean, the act of the Commission.

Mr. Treadwell: That's right.

Judge Orr: You are claiming that they are exercising authority or attempting to exercise authority which no where exists.

Mr. Treadwell: That's right. But we claim that the Act is itself unconstitutional, and we have strong——

Judge Orr: What do you mean, the California Act?

Mr. Treadwell: The California Act imposing these penalties.

Judge Goodman: Well, it is not so much, Mr. Treadwell, [fol. 284] that you are objecting to the penalty, as that you just say they haven't got any right to impose it at all.

Mr. Treadwell: That's right.

Judge Goodman: Well, that goes to the jurisdiction. Once you talk about just the right to impose the penalty, then you have to assume that they have jurisdiction. But

the particular act of imposing the penalty is unconstitutional.

Mr. Treadwell: No, Your Honor. Whether they have the jurisdiction or not, the penalties could be void. That is our contention, that even if the Court should hold that they have jurisdiction, then the validity of the penalties would come up, and in the second place we allege that this air line is not within the provisions of the California Act in imposing those penalties. The argument on that, Your Honors, is this, that the Act imposes penalties on certain public utilities and on common carriers but——

Judge Orr: Within the State?

Mr. Treadwell: Yes.

Judge Orr: Did it attempt to impose anything outside the State?

Mr. Treadwell: Well, I wouldn't think so

Judge Orr: Well then, I have this thought in mind then, the Act itself, if it does not go that far, just reading it, it is not unconstitutional, is it? It is not the Act itself, but it is the unlawful, you allege, the unlawful enforcement?

[fol. 285] Mr. Treadwell: Well, no, Your Honor. We say that——

Judge Orr: Or attempted enforcement.

Mr. Treadwell: We say that in imposing these penalties, it comes directly within the ex parte Young case and other cases that we have cited, and it is held, Your Honor, in the cases which we have cited in our brief, that where you impose a penalty and the party who is to enforce it, can simply sit down and wait, neither bring any action for years, that that makes it an illegal penalty because it takes away your property without any reference to formally informing you of your offense and what your offense is but by simply accumulating it over a period of years you make it absolutely prohibitory for anybody to do business.

Judge Orr: You may have a cause of action there, Mr. Treadwell. Where should that be tried? Should three judges—does a three-judge court have jurisdiction there where it may be that the provisions of the state statute itself is perfectly constitutional, that it doesn't attempt to regulate in the fields which have been taken over by the Federal

Government? But then, we will say, that being the case, that the Commission charged with the enforcement of those provisions, misread it and attempts to give it a larger application than it really has and applies it. Then what is your remedy then? Isn't it the proposition that—can't you get a declaratory judgment or restraint against those [fol. 286] individuals because of their attempting to enter this field which the statute itself does not authorize them to enter?

Mr. Treadwell: Well now, if Your Honor please, that is not the situation as we view it. The cases that we rely upon are that the statute itself, when it is of that nature, that it permits the accumulation of the penalties in that way, making them prohibitory and prohibitive, that the statute itself is unconstitutional, and that is what we allege.

Judge Goodman: But, Mr. Treadwell, don't you think then in equity the court can look right through that and see that your real ground is that the state has no right to enter this field? You are not complaining, as would a citizen of California who was subject to the regulation of this statute, that the statute is unconstitutional with respect to the manner in which these penalties are provided for in the statute. What you are complaining about here in equity is not that you don't like the way the penalties are being assessed but that the State hasn't got any right at all to enter this field, that you are solely subject to Federal regulation.

Now, that is your real question. So in attempting to get that before a three-judge court, you put the allegation in your complaint that the state statute is unconstitutional because of the fact that the penalties that are sought to be [fol. 287] imposed have been declared in certain cases to be of a nature to have the infirmity that results in invalidity in the statute itself. But that is not the way you are really—that is not your complaint. Your complaint is that the state hasn't got any right to come in here at all.

Mr. Treadwell: Well, I don't think——

Judge Goodman: So you are asking us to decide an academic question, to decide an academic question that does not specifically arise under the three-judge statute at all. You should come in, in the regular way, in the court and

make your application and state your cause of action, that this is a federal field and that the state has got no right to enter into it, set up your cause of action and ask for your relief, equitable or otherwise.

Mr. Treadwell: Well, if Your Honor please, a person cannot very well come into court and divide up his cause of action and put it up in several pieces and expect to leave any of it out. We have all of these wrongs. We have the wrong of the Commission interfering at all. That is one wrong.

In the second crime, even if they have a right to control in certain ways, still they would have no right to these penalties. Now why should Your Honors say that to one of them—of course, one of them is bigger because it includes the whole, but sometimes you lose the whole, your [fol. 288] extreme position, and still the question as to validity of these questions of penalties is here and it is included here. I did not select the three-judge court or have anything to do with it. The question of whether it is a three-judge court case or one for the court to decide, the court is to determine under the statute.

Judge Orr: That is what we want to do right now.

Mr. Treadwell: The Court has done that.

Judge Orr: We had to convene for that purpose, I think. We want to find out whether we do or not.

Mr. Treadwell: Your Honors will note these cases on page 7 of our brief. These rules are just as applicable to a three-judge court as a one-judge court.

Judge Goodman: Is there any question at all in your mind as to the jurisdiction of this court to hear your case?

Mr. Treadwell: None at all.

Judge Goodman: Without the imposition of the three-judge court?

Mr. Treadwell: I don't think so. I think it is a case which requires a three-judge court because we raise the constitutionality of the state statute.

Judge Goodman: Of course you can raise the constitutionality of the state statute in a case other than a three-judge court. But what I am trying to find out, are you satisfied in your own mind that this court has jurisdiction of your cause of action as a United States District Court?

[fol. 289] Mr. Treadwell: Well, I was just coming to that. That is to answer what they say about this Alabama case. This Alabama case——

Judge Goodman: I only ask that, Mr. Treadwell, because if that is so, why, we could just go ahead and hear this case, and I will extend the invitation to Judges Orr and Murphy to sit with me as a District Court, and if we came to a unanimous decision it would still be a district court and not a statutory three-judge court.

Mr. Treadwell: They say you can't do that.

Judge Goodman: I beg your pardon?

Mr. Treadwell: There are decisions that say that the court cannot call in two judges to assist him.

Judge Orr: Then they can be spectators.

Mr. Treadwell: They can be spectators. That is all they would be.

Now, Your Honor, this Alabama case is a serious proposition. In that case——

Judge Orr. Well, if you will pardon just another interruption here. If your theory is a theory that the United States of America has preempted this field, if your theory is correct, then there is no reason for a determination of whether the penalties are excessive or not. Wouldn't that be the case?

Mr. Treadwell: That is right. I have suggested that [fol. 290] in my brief, Your Honor, that there is not need to decide that question if you decide with us that they have no jurisdiction over the route. That's all there is to it. Of course, penalties would have no effect against us if they have no jurisdiction.

Judge Goodman: Well, then, if that were the case, Mr. Treadwell, the three-judge court could dissolve and the United States District Court in the regular way proceed to determine a question, primary question, as to whether or not, irrespective of constitutionality of the statute, as to whether or not the state would come into this field at all or whether a declaratory judgment should not issue.

Mr. Treadwell: Of course, Your Honor, we are not withdrawing any part of our case. But there is the power of the Court, with the case here before it, to determine what issues could be decided that would give us all the relief that we

ask for and still avoid the passing on any constitutional question. That is a power that the courts exercise.

Judge Orr: I suppose one judge could proceed to the point where it would determine that the constitutional question was present, and then convene as such and determine as becomes necessary. But all of the other propositions could be determined by one judge. I suppose you admit that, don't you, that one judge could, the regular district [fol. 291] court, could make a determination of whether the United States has preempted this field?

Mr. Treadwell: I think it could if it was presented separately. But it isn't presented separately. It has been presented in this complaint and the court has got to look at the complaint and determine whether the three-judge court is proper in the case and then the decisions are that that court has power to pass upon all issues, whether they affect constitutionality or not, that any issue in the case they can pass upon, and that seems reasonable because you just can't fix up a case and have it today in one court and tomorrow in another court.

Judge Goodman: You would feel satisfied that if this three-judge court decided—did not decide the constitutional question but decided the primary question that the state had no right to be engaged in this regulation, that that decision would be sustainable and within the jurisdiction of the three-judge court?

Mr. Treadwell: I don't put it that way, your Honor. I put it this way, that if this court or any court that has jurisdiction in this case gives us all the relief that we are asking for by enjoining them from interfering with this route at all, why then I concede there would be no necessity of also passing on the question of the validity of the penalties. But I don't withdraw them or anything of that [fol. 292] kind. But I just say if the court should do that, we rely on them and we rely on them and ask for a decision

I can make that clear, Your Honor, in this way. We complain that the statute does not apply to us that imposes these penalties. We have had three cases with the Public Utilities Commission over penalties under that same Section and the court has held, the Superior Court of San Mateo County, and the Superior Court of Los Angeles County,

have both held that the penalties do not apply at all to air carriers. So we are not waiving a decision on that. We are just saying that if in some way or other the court could give us all the relief that we are entitled to without passing on that question, it would be all right with us.

Judge Orr: Your position is this, as I understand it, that you have several grounds for relief, and you allege several grounds for relief, among those grounds being that a certain statute is unconstitutional. That that bringing in of the fact of the unconstitutionality of the one statute brings into play the jurisdiction of the three-judge court and that they then can determine any of the grounds for relief that you allege?

Mr. Treadwell: That is exactly our position, Your Honor. We have cited cases that uphold that.

Now if Your Honors please, I would like to say a word about this Alabama case. That case was rather a revolu-[fol. 293] tionary case and I have the authority of the chief attorney for the Public Utilities Commission that it is a revolutionary case. But at any rate, it decided that when the Commission had refused the proper relief that the complaining party thought he had, that he could not then file a suit in the federal courts but that he would have to go into the state court and file any suit that he had, and they pointed out, as counsel here in his argument attempted to point out, that the state courts have jurisdiction.

Well, the trouble with that is that these statutes that constitute the Public Utilities Law of California are entirely different from what they were in Alabama, where such a suit could be maintained, and they provide that no court of the state may in any way adversely affect any order of the Commission. So it is absolutely impossible to go into the state court. There is no state court that could give you any relief. They couldn't enjoin them, couldn't reverse, couldn't remand, or do anything with it, and that statute has been held constitutional by the California courts on the grounds, that I don't need to talk about here. So the Alabama case does not apply to the California situation at all. They held that where you had adequate remedy by a suit in the state court, why, that you could not bring it into the federal court. But since we had no remedy in the state

court, we couldn't possibly—if the Commission only [fol. 294] threatened something or if they actually had done something, if they actually had done something, our remedy of course would be to go to the Supreme Court on a writ of review.

Where they haven't done anything it is——

Judge Orr: Pardon me. How much longer do you expect to be?

Mr. Treadwell: I don't think I will be very much longer. I don't expect to be very much longer.

Judge Orr: Do you expect to take very much time?

Mr. Ozment: Only 10 minutes, unless I may be permitted to talk about the status of the water between the mainland and California.

Mr. Treadwell: Now, something was said in connection with the argument that has already been made by the defendants about the penalties and their accumulation and their large amount and long periods that have already expired in being a ground of irreparable injury. That was all discussed in the Young case by the Supreme Court of the United States and they know that the claim of penalties over the long period that were allowed to accumulate was an irreparable injury.

Judge Orr: What case was that?

Mr. Treadwell: Ex parte Young, Supreme Court of the United States. Young was the Attorney General of Minnesota, I think.

Judge Orr: Cited in your brief, I imagine.

[fol. 295] Mr. Treadwell: Yes, it is all covered.

So we think there is no basis at all for argument there is no irreparable injury shown. Have a thing like that under you all the time, $730,000 a year would break any company and certainly be irreparable, and it has been held to stop a multiplicity of suits was a definite ground of equitable relief, and if there were large and repeated accumulations that they were irreparable.

I think that is the only thing I wish to talk about on that subject. I would rather hear the argument. It is understood, as I understand it, Your Honor, that if we wish to

file further briefs covering any of the matters here we could do so.

Judge Orr: Hasn't been so understood yet. I did not know any request of that kind had been made.

Mr. Treadwell: We are satisfied with our brief as it is, Your Honor. We anticipated all these questions and I think we have answered them.

Judge Orr: The way we understand the matter now, Mr. Treadwell, on the matters now presented before us, we will pass on the motion to dismiss. If we should determine that the motion to dismiss should be denied, then of course we would have to afford counsel for the Commission and for the Attorney General to furnish further—maybe you would want to plead then, wouldn't you?

[fol. 296] Mr. Phelps: Yes, Your Honor.

Judge Orr: Give some time to plead; if the issue is joined, then have to take evidence on it, I suppose.

Mr. Treadwell: Yes, I think that is the way the thing lines up.

Judge Orr: Yes.

ARGUMENT BY MR. OZMENT FOR INTERVENORS

Mr. Ozment: May it please the Court, we too have prepared a memorandum which purports to cover most of the issues in the case, both as to the merits and the matters there placed in the motion to dismiss. We have prepared this on the assumption at this juncture we would have been permitted to intervene. I ask leave and submit at this time and ask the Court to ignore the captions to the effect that we are an intervenor.

Insofar as the question of jurisdiction is concerned, we have covered that in our memorandum. Not, however, the question of the three-judge court.

I would like to speak very briefly on the subject of the Alabama Public Service Commission case. In that case the matter involved was purely intra-state transportation, no question in anybody's mind about that. The court said it was intra-state, it was a matter purely for local concern. This isn't the case at all. Here the question is whether

these operations are interstate or whether they are intrastate, which is quite a different situation in the normal [fol. 297] intra-state field.

This is the precise type of case which the federal courts habitually decide. There is a claim here that there is a conflict between state and federal regulations. In most cases those are decided in the first instance by the federal court rather than remanding the matter to go through the state courts. That assumes, of course, that the state remedies are adequate on which we, of course, take no position.

The Board's interest in this matter is, of course, as to who has regulatory jurisdiction over this operation. These very waters have been the subject of prior judicial decisions in the Wilmington case, cited in our papers. The Supreme Court of the United States held that transportation between Avalon and San Pedro, which is precisely the same transportation that is here involved, was subject to rate regulation by the State of California until such time as the Federal Government should have acted.

Now, the Federal Government has acted in this matter, and our position, of course, is that we seek merely a declaration to that effect.

Now, as to the three-judge court, I would not add anything to what Mr. Treadwell has said. In our judgment the case can properly be disposed of by the three-judge court sitting as a statutory three-judge court upon the [fol. 298] finding that there is a substantial constitutional issue presented, even though the court never reaches that substantial constitutional issue, as a basis for its decision.

By the same token, our position is that if the court should see fit to base its decision on the question of preemption of the field of regulation that that is a matter which properly could be decided by a one-judge court so the Civil Aeronautics Board's concern, whether or not it is a three-judge court or a one-judge court, we think the court can properly decide the case, it being of significance primarily as to whether it goes to the Supreme Court first or whether it has to go through the Circuit Court in the further stages of the case.

Judge Orr: I assume, as far as you are concerned, the constitutional question doesn't concern you so much.

Mr. Ozment: No, indeed.

Judge Orr: That question invoking the jurisdiction of the three-judge court doesn't concern the government.

Mr. Ozment: No, sir, we have no legal concern in that matter at all.

Judge Goodman: Apparently, in my study of the three-judge statutes, the main reason Congress imposed them respecting the question of enjoining the operation of a statute on the ground of constitutional infirmity was so important they thought it wise to call three judges in to [fol. 299] hear it and with the direct appeal to the Supreme Court. If that question is not really involved, then the two extra judges shouldn't be taken from their other work and brought in here if the question itself can be decided primarily upon the principal ground that it doesn't involve the validity of the Federal statute.

Mr. Ozment: That is correct; but in this case the three judges are here. In other words, they have been convened. My point was merely the practical one that we think that the court can go ahead and decide the case, the three-judge court, or two just can disassociate themselves and one judge go ahead and decide. We are proceeding on the assumption this is the Board's area of regulation rather than the state of California.

One further word about the allegation to the complaint. As I read the cases, those are the standard allegations in this type of case. In other words, the plaintiffs in this case have alleged just precisely what plaintiffs always allege in such cases, ex-parte Young, that whole line of cases involving claims of conflicting federal and state regulation. The carrier doesn't know what position he is in. He can't accept two masters, he has to decide to which he is answerable, and we think that that does make, I think, a clear case for the jurisdiction of the Court, and we ask the Court to retain the case and to decide it and unless the Court de- [fol. 300] sires to hear something concerning the status of those waters between the mainland and Santa Catalina, I have nothing further.

Judge Goodman: If the court should deny this motion to dismiss, would counsel on all sides be agreeable to hearing the matter on the merits for final injunction instead of having just a hearing on the preliminary injunction? We do that sometimes in these three-judge cases.

In other words, if we take under advisement the matter of the motion to dismiss and then it should be denied, we could then set the matter down for hearing, because there is a temporary restraining order that is in effect until such time as we make a decision, have the pleadings filed and determine the matter on the merits rather than on just an application for preliminary injunction.

I don't know what the desires of counsel are in that regard, but that is a speedy way of determining litigation in these three-judge cases.

Mr. Ozment: We are willing to submit the case for final decision at this time. We don't think there are any real facts in dispute.

I would like to hand up some Coast and Geodetic Survey maps just so the Court can locate the Island, and in the decisions we have cited we talk about this bay and talk about that bay.

[fol. 301] COLLOQUY

Judge Orr: You are talking about something a little different. Maybe all parties might be able to submit the case on the whole question that has now been offered. I don't know if that is the case. It wouldn't be necessary for any further hearing to be had, but you could file further briefs if you want to answer.

Mr. Phelps: Yes, Your Honor, in the event the motion is denied I should like the opportunity to file an answer. I had hoped also to have the opportunity to be heard upon the question of injunctive relief; time will not permit that.

Judge Orr: What do you think of the suggestion of Judge Goodman's that if we deny the motion to dismiss, that after the pleadings have been filed we hear the matter on the merits and the question whether permanent injunction should be issued?

Mr. Phelps: I am a little reluctant, Your Honor, to acquiesce in that for this reason: To the extent that the plaintiff's complaint and case rests upon the need for equitable relief in the form of an injunction against any action taken by the Commission, I should like to be heard upon that question.

Judge Goodman: That would apply whether it is a preliminary injunction or a final injunction, wouldn't it? Wouldn't make any difference, involves the fundamental question whether equitable relief in the form of an injunc-
[fol. 302] tion should issue, that is all.

Mr. Phelps: Yes.

Judge Goodman: I merely threw that out as a suggestion, makes it a little less work for the lawyers involved in the case, too, don't have to have both a hearing on a preliminary injunction and a hearing on a permanent injunction. That is disposed of in the same way, but it has a finality to it that allows either party to forthwith take an appeal.

However, I wouldn't suggest that the court make any order, I am merely suggesting.

Judge Orr: It is a practical situation, just a practical situation. Whatever is done, your situation is subject to this injunction which is now in force and effect. Whether it should be listed right away or whether it will wait until we can determine the whole matter, your rights will be the same in the long run, get the same adjudication.

Mr. Phelps: See if I understand your Honor. The suggestion of Judge Goodman is the Court will rule upon the motion to dismiss first and in the event that it is denied that then there should be a further hearing which will include a hearing, an argument, I presume, on the question whether or not injunctive relief should be granted?

Judge Goodman: With time allowed to file responsive pleadings.

[fol. 303] Mr. Phelps: I think that will be satisfactory.

Judge Orr: That be agreeable to you, Mr. Treadwell?

Mr. Treadwell: Seems to me, Your Honor, it would be all right.

Judge Orr: How about counsel——

Mr. Perry: I think the Attorney General would have no objection. I would like one point of clarification, Your

Honor. That is, as I understand this proceeding, the plaintiffs have requested an interlocutory injunction pending trial of the action for declaratory relief. Now, if we proceed, if it results in a permanent injunction, does not then the action for declaratory relief from the plaintiffs point of view become moot to the prejudice of the defendants? I understood, in other words, that their motion for injunctive relief at this time was just until they got into court on their action for declaratory relief, but that they weren't relying solely on an action for injunctive relief to determine the merits of the case.

Judge Orr: Those things would come down simultaneously, wouldn't they?

Judge Goodman: That's right, Judge. All I am suggesting is that instead of having a hearing on the preliminary injunction, just have a trial in the case.

Mr. Perry: I think that would be satisfactory with the Attorney General.

[fol. 304] Judge Goodman: Each side present any matter they wish.

Judge Orr: The motion to dismiss will stand submitted. The question of the motion to intervene will also be submitted and we will rule upon that at the time we rule on the motion to dismiss.

Mr. Ozment: Thank you, Your Honors, and may I at this time lodge with the Clerk maps of the coastal area here just in the event the Court should find it necessary to use them. They are non-controversial, Coast and Geodetic Survey maps.

Judge Orr: Taken unofficially?

Judge Goodman: Any objection to their being marked?

Mr. Phelps: I am sure I will have none.

Judge Goodman: They can be marked.

Mr. Phelps: I have no objection.

Judge Orr: Might have them marked as a proposed exhibit.

Mr. Ozment: All right.

Judge Orr: Got a rather incongruous situation of a party that has not been admitted to intervene——

Mr. Ozment: I will withdraw them, Your Honor, if you think it best.

Judge Orr: Let the Clerk have custody of them and we can determine that later. We will be at recess.

Mr. Treadwell: Wondering, Your Honor, shouldn't the motion for temporary injunction be submitted or something [fol. 305] so that Your Honors can make any order?

Judge Orr: The understanding is that the restraining order which has already been issued remain in force and effect until determined otherwise.

Be at recess.

Filed Sep. 17, 1952. C. W. Calbreath, Clerk.

[fols. 306-307] In United States District Court
[Title omitted]

Transcript of Proceedings on Motion for Preliminary Injunction—Friday, November 21st, 1952.

Appearances:

For the Plaintiffs: Messrs. Treadwell & Laughlin, by Edward F. Treadwell, Esq., Reginald S. Laughlin, Esq., and Colin C. Kelley, Esq.

For the Defendants: J. T. Phelps, Esq., and Everett C. McKeage, Esq.

For the Intervenors: O. D. Ozment, Esq., Attorney Civil Aeronautics Board, Elmer Collett, Esq., Assistant United States Attorney.

[fol. 308] Colloquy Between Court and Counsel

The Clerk: United Air Lines, Incorporated, et al., vs. the California Public Utilities Commission. Court trial. Motion for leave to file answer to Intervenor's complaint, before Honorable Judges William E. Orr, Edward P. Murphy and Louis E. Goodman.

Judge Orr: Are you ready, gentlemen?

Mr. Phelps: If Your Honors please, Mr. Treadwell and Mr. Ozment, counsel for the plaintiffs and for the Civil Aeronautics Board, have kindly consented to allow me to go forward briefly with the motion which I have filed, leave

to file an answer to the Intervenor's complaint. I promise to be brief, but in a few words I should like to give the reasons why I filed this motion.

When this Court overruled the defendant's motion to dismiss, which was heretofore filed, and ordered the defendants to answer, it was my opinion, after reading the Rules of Civil Procedure, Federal Rules, specifically Rule 7(a), that the Rules did not contemplate or even permit the filing of a separate answer to an Intervenor's complaint. So at the time we filed our answer to the plaintiffs' complaint we did not file a separate answer to the Intervenor's complaint. Subsequently Mr. Ozment suggested the desirability of our filing a separate answer to their complaint and indicated that they were anxious to have an expres-[fol. 309] sion of our position on certain allegations in their complaint which they felt were not exactly parallel to those set out in the plaintiffs' complaint. I indicated I have no objection to that, and I have drafted such an answer and have attached it to my motion for leave to file an answer, and I am quite willing to leave it entirely up to the Court. If the Court feels that such an answer should be filed or is permitted to be filed, I am quite willing that it should be. If the Court feels that it is not permitted, I am willing that our answer should be rejected.

Judge Orr: Is there objection?

Mr. Ozment: No, Your Honor.

The Court: The order may be entered permitting you to file it.

Mr. Phelps: Thank you.

The Clerk: Will respective counsel please state their appearances?

Mr. Treadwell: For the plaintiffs, Your Honor, Edward F. Treadwell, Reginald S. Laughlin, of the firm of Treadwell and Laughlin. We also have associated with us Mr. Colin C. Kelley. I think he possibly at the former hearing was associated.

Mr. Ozment: O. D. Ozment, Attorney Civil Aeronautics Board, and Mr. Elmer C. Collett, U. S. Attorney's office, for the Civil Aeronautics Board.

[fol. 310] Mr. Phelps: J. T. Phelps and Everett C. McKeage, on behalf of the defendants.

OPENING STATEMENT BY PLAINTIFF

Mr. Treadwell: Your Honors please, in view of the fact that we argued considerably orally and also by briefs on the motion to dismiss, we do not think it is necessary to make what might be deemed ordinarily an opening statement before we proceed with the trial. I think Your Honors are pretty well advised as to what the issues were at the time of the argument on the motion to dismiss. However, there are a few matters that have occurred since that time and we think we should lay those before the Court at this time.

We have prepared and filed a very elaborate brief on the motion to dismiss and we want that brief to stand, but we are going to file a supplement to it, which we will have ready to file today.

Now, first as to the plaintiff's route. The defendant has filed an answer to the complaint and they deny that the route continues over the high seas and outside the boundaries of the territorial jurisdiction of the State for a distance of about twenty-four miles. But they admit that the route begins in Los Angeles County and terminates at Avalon.

It is hard, Your Honors, to understand the reason for that denial. It is alleged in the complaint that the route proceeds for a distance of twenty-four miles from the sea coast to Avalon, and if you deduct from the thirty miles dis- [fol. 311] tance, which it is from the coast to Avalon, the three mile range along the coast and the three mile range along the island, which is six miles, that would leave you twenty-four miles which is alleged is outside the territorial jurisdiction of the State of California.

The only explanation of it, that I know, is what I have seen in the press in the last week, that is, in the case of United States against the State of California which was originally reported in 332 U. S. 19, wherein the State is claiming that the boundary of California should be determined by taking the capes along the coast and drawing straight lines from one cape to the other and including all the land that falls within that straight line as being part of the State of California, and all I can say on that, Your

Honors, is that according to the press in the last few days the Special Master appointed by the Court has held that that is an unsound view and we haven't yet had access to that report but I have no doubt of the correctness of the press dispatches and we won't say nothing more about it.

Judge Goodman: Do the defendants deny the distance of the route?

Mr. Treadwell: No. I am just coming to that, Your Honor.

Judge Orr: That is the Tidelands Case you are speaking about?

[fol. 312] Mr. Treadwell: Yes, the so-called Tidelands Case.

The defendants further admit in their answer that the distance from the Mainland to Catalina Island is approximately thirty miles. They also admit that no rates, fares or charges pertaining to said route have been filed with the defendant Public Utilities Commission of the State of California, and admit that the Public Utilities Commission now claims and asserts that all the rates, fares and charges of said route must be filed with the Public Utilities Commission.

Now in the defendants' answer, which they have just filed now, to the complaint and intervention, they admit that flights to Santa Catalina Island require flights of aircraft over waters, but they deny that such waters are outside the boundaries and territorial jurisdiction of the State of California.

In the same answer, paragraph 6, they deny that they have informed the plaintiffs that said route and operations between Santa Catalina Island and the Mainland of California are entirely within the regulatory province and jurisdiction of the Commission, but admit that said Commission has informed the plaintiffs that all rates, fares and charges for such transportation between Santa Catalina Island and the Mainland of California must be filed with said Commission.

The same paragraph of the answer of the defendants deny that they have threatened to institute proceedings to [fol. 313] recover penalties, and deny that the defendants, or any of them, intended by the institution of proceedings

before the Commission and the Courts to undertake to exercise regulatory control over the said route and operations except such control over the rates and charges pertaining to said route and operation as may be finally determined and justified after formal proceedings commenced by an order of the Commission instituting investigation into said route and operations.

In the complaint, Your Honors, we set forth many grounds of jurisdiction of the Court, among others the Section 1337 of the Code which gives jurisdiction of all cases, irrespective of citizenship or amount involved, that involve an Act of Congress for the regulation of commerce, but we did allege it exceeded the jurisdictional amount, and they put that in issue, whether the jurisdictional amount is exceeded.

We think that the matter is entirely immaterial because jurisdiction has been held, in the case of Mulford against Smith, 307 U. S. 38, 46, where they directly held the Court had jurisdiction irrespective of diversity of citizenship or amount of controversy.

Your Honors will remember that one of the questions raised on motion to dismiss was the contention that the matters would have to first be decided by the State Courts. Since that time Your Honors—that was fully argued in our brief—but since that time the decision by the District [fol. 314] Court of New Jersey has been rendered in the case of Pennsylvania Greyhound Lines, Incorporated, vs. the Board of Public Utilities Commission, Department of Public Utilities, State of New Jersey, Civil Number 65051. In that case the opinion was written by Judge Foreman, and he referred to this Rule as to waiting for decision by the State Court. He said that that was a proper Rule where the whole question involved the construction of State Statutes, but where the main question was Federal Statutes, as it is here, the Civil Aeronautics Act, which claims jurisdiction, as we claim, over this route——

Judge Goodman: Mr. Treadwell, it is difficult for the members of the Court to follow this presentation. This is the trial of this case, and I think the first thing that should be done is to make the record on which the cause can be sustained, and then make any legal answer you wish. We don't know if there is any factual controversy here. That

should be gotten out of the way first, and if you have any difficulty about that, I suggest that my colleagues, since we are governed by the Federal Rules of Civil Procedure, we can have a pre-trial conference right now and find out what really is in controversy, if there is anything in controversy of a factual nature.

Mr. Treadwell: We are not going any further, Your Honor. We had just concluded what we thought was wise to call to the Court's attention, but we are ready to put [fol. 315] in our evidence and it will be very brief.

We will call Mr. Dillworth.

W. D. DILLWORTH, called on behalf of the plaintiffs, sworn.

The Clerk:

Q. Please state your full name to the Court, sir?
A. W. D. Dillworth.

Direct examination.

Mr. Treadwell:

Q. Mr. Dillworth, what is your occupation or profession?
A. I am traffic manager for United Air Lines.
Q. And as such have you become acquainted with the portion of the United Air Lines layout generally referred to as the Catalina Route?
A. Yes, I have, sir.
Q. How long have you worked for the United Air Lines?
A. Slightly over nine years.
Q. And have you also become familiar in that connection with the company known as the Catalina Air Transport?
A. Yes, I have.
Q. Did you know the route when they operated it directly themselves?
A. I wasn't too familiar with it at that time, but at the [fol. 316] time United became interested in taking over that operation it was generally my first real familiarity with the route.

Q. About when was that?

A. That was in June of 1946.

Q. So since that time you have been quite familiar with the route?

A. Yes, I have, sir.

Q. And will you describe where the route initiates, starts, and where it terminates?

A. The Catalina Route, as we operate our flights, originates in Los Angeles.

Q. At what point in Los Angeles?

A. In Los Angeles at the International Airport. And proceeds to Long Beach, which is the Long Beach Municipal Airport, which is approximately 15 miles away from that point, and it proceeds over the ocean to the Catalina Airport at Catalina, which is a distance of approximately 32 miles.

Q. That is the distance from the shore of the Pacific Ocean in Los Angeles County out to Avalon, that is substantially 32 miles, is that right?

A. From the Long Beach——

Q. From Long Beach. Long Beach is right on the shore, is it not?

A. Yes.

Q. And is there an airport there?

[fol. 317] A. Yes.

Q. How close to the shore is the airport?

A. Well, the airport, as I recall, is very close to the shore itself.

Q. So from the shore to Avalon is substantially 32 miles?

A. Yes, sir.

Q. Now, during the time that you have been familiar with this line, have the rates, tariffs of the companies operating it been filed with the Civil Aeronautics Board?

A. Yes, insofar as, particularly, United Air Lines is concerned, we took over the tariffs that Catalina had effective as of June 20, 1946. Those were filed with the Board on behalf of the United Air Lines at the time and have continued to be filed with the Civil Aeronautics Board.

Q. And were those the tariffs that were filed with the Public Utilities Commission of California?

A. No, sir, they have not been.

Q. During the time that you have been familiar with the route, have the United Air Lines and Catalina Air Transport regularly filed the reports required to be filed by the Civil Aeronautics Act?

A. Yes, sir. United files the same reports for that operation as it does for its other operations throughout the United States.

Q. Those are filed with the Civil Aeronautics Board?

[fol. 318] A. With the C. A. B., yes, sir.

Q. And not with the California Public Utilities Commission?

A. No, sir, we have never filed them with it.

Mr. Treadwell: While this witness is on the stand, I would like to introduce some exhibits which possibly counsel would like to ask him about.

We have certified copies, Your Honors, of all the principal documents between the plaintiffs here and the Civil Aeronautics Board duly certified by the officials of that body. The first one is the operating agreement between United Air Lines, Inc., and the Catalina Air Transport, and opinion and order of June 3, 1946, by the Civil Aeronautics Board approving said agreement, and the operation by the United Air Lines over the route of Catalina Air Transport, and all supplemental agreements filed with the Board between United Air Lines, Inc., and Catalina Air Transport relating to the operation by United over the route of Catalina Air Transport, and orders by the Civil Aeronautics Board approving all of such supplemental agreements.

These are all fastened together, Your Honors, and there is attached to them a certificate, and we ask that that be marked as one exhibit, Plaintiffs' exhibit.

OFFERS IN EVIDENCE

The Clerk: Plaintiffs' Exhibit 1 introduced and filed into evidence.

[fol. 319] (Thereupon documents referred to were received in evidence and marked Plaintiffs' Exhibit No. 1.)

Mr. Treadwell: These are deemed read, Your Honors? They may have been deemed read?

Judge Orr: Pardon me, but I didn't hear you.

Mr. Treadwell: I say they may have been deemed read, this last exhibit?

Judge Orr: Yes.

Mr. Treadwell: The second one is true copies of the tariffs of United Air Lines, Incorporated, currently on file with the Civil Aeronautics Board and covering the transportation of persons between Avalon, Santa Catalina Island, California, and points on the Mainland of California, and other points within the continental limits of the United States, of all tariffs of such transportation filed with the Civil Aeronautics Board by Wilmington Catalina Air Lines Limited, Catalina Air Transport, and United Air Lines, Incorporated, for the period November 1st, 1938 to and including the date of this certificate.

We ask that those, which are all bound together and fastened together with a certificate of their correctness, be marked as one exhibit.

The Clerk: Plaintiffs' Exhibit 2 introduced and filed into evidence.

Judge Orr: You are introducing them in evidence now, [fol. 320] are you?

Mr. Treadwell: Yes, Judge Orr; any objection?

Mr. Phelps: No objection.

Mr. Treadwell: May they deemed to have been read?

Judge Orr: May be admitted and so marked.

(Thereupon documents referred to were received in evidence and marked Plaintiffs' Exhibit No. 2.)

Mr. Treadwell: The third one is certified copy of the opinion and order of October 13, 1939 by the Civil Aeronautics Authority authorizing the issuance of certificate of public convenience and necessity to Wilmington Catalina Air Lines Limited for the transportation of persons and property between Wilmington, California, and Avalon Santa Catalina Island, California, and of such certificate.

Second, opinion and order of July 22, 1941, by the Civil Aeronautics Board authorizing the amendment of the certificates described in paragraph 1 hereof by reflecting a change in the carrier's name to Catalina Air Transport,

and by authorizing the carrier to engage in the transportation of persons and property between Los Angeles, California, and Avalon Santa Catalina Island, California, via Wilmington, Long Beach, California, and of such amended certificate.

Three. Order of June 23, 1942, by the Civil Aeronautics Board authorizing Catalina Air Transport to suspend service over its route described in paragraph 2 hereof.

[fol. 321] Those documents are all fastened together under the certificate, and we ask that they be admitted in evidence and marked Plaintiffs' Exhibit 3.

Judge Orr: If there be no objection, they may be admitted.

Mr. Phelps: No objection.

The Clerk: Plaintiffs' Exhibit 3 admitted and filed into evidence.

(Thereupon documents referred to were received in evidence and marked Plaintiffs' Exhibit No. 3.)

Mr. Treadwell: While Mr. Dillworth is on the stand, we also wish to introduce certified copies of U. S. Coast and Geodetic Survey maps of this territory involved and duly certified by the Department of Commerce as being on file in the United States Coast and Geodetic Survey. The first one is entitled San Diego to San Francisco Bay. I don't think it is feasible to exhibit them to the Court at this time. We ask they be admitted in evidence and marked Plaintiffs' Exhibit 4.

Judge Orr: Number 4. If no objection, they will be admitted.

Mr. Phelps: No objection.

The Clerk: Plaintiffs' Exhibit 4 introduced and filed into evidence.

(Thereupon documents referred to were received in evi-
[fol. 322] dence and marked Plaintiffs' Exhibit No. 4.)

Mr. Treadwell: The other one likewise duly certified by the Department of Commerce as being in the files of the United States Coast and Geodetic Survey entitled San Pedro Channel—it says here Palos Verdes Hills down to

Dana Point. We ask that be admitted in evidence as Plaintiffs' Exhibit 5.

Judge Orr: It may be admitted.

The Clerk: Plaintiffs' Exhibit 5 admitted and filed into evidence.

(Thereupon document referred to was received in evidence and marked Plaintiffs' Exhibit No. 5.)

Mr. Treadwell: Now, if the Court please, the parties were able to agree on certain facts in the case and they have been embodied in a brief statement of facts which reserve to the parties the right to introduce further evidence and is signed by the attorneys of the plaintiffs, the attorneys for the defendants, and the attorneys for the intervenor. There had been quite a bit of communication between the Public Utilities Commission and the Air Line on this subject and those letters are incorporated and attached to and made a part of the brief statement. We have three copies here for the Court, and we ask that it be admitted in evidence and be deemed read.

Judge Orr: In the absence of objection, it will be ad-
[fol. 323] mitted.

The Clerk: Plaintiffs' Exhibit 6 introduced and filed into evidence.

(Thereupon document referred to was received in evidence and marked Plaintiffs' Exhibit No. 6.)

Mr. Treadwell: I think that is all I want to ask you, Mr. Dillworth.

Judge Orr: Any cross-examination?

Mr. Phelps: I have none.

Judge Orr: You may be excused.

(Witness excused.)

Mr. Treadwell: Now one matter, Your Honors, that I will have to testify to, unfortunately, and I ask that I be permitted to be sworn.

EDWARD F. TREADWELL, called on behalf of the plaintiffs, sworn.

The Clerk:

Q. Please state your appearance for the record, sir?

A. I am Edward F. Treadwell and one of the attorneys for the plaintiffs in this case.

Direct examination.

Mr. Kelley:

Q. Mr. Treadwell, you recall a conference in the office of the chief counsel of the Public Utilities Commission on February 27, 1952?

[fol. 324] A. I do.

Q. Who was present at that time?

A. Judge McKaeg-, the chief counsel of the Commission, and it is hard for me to get the names—the gentleman right behind you.

Q. Mr. Phelps?

A. Mr. Phelps. Either Mr. Phelps or Mr. Kline. There was some change made just at that time, and they may have both been there, but they didn't figure particularly in it except that they might have been there. I couldn't say positively. I know that the matter was—there was a change in the Commission and Mr. Kline took over some of the duties of Mr. Phelps.

Q. Do you recall a conversation?

A. Wait a minute. Excuse me, I am sorry. There was also present at the time myself and my partner, Mr. Reginald S. Laughlin.

Q. Do you recall a conversation regarding this Catalina problem coming up at that time?

A. Yes, I do.

Q. Would you repeat what was said at that time?

A. Well, we had gone there on an engagement with them and to discuss some matters other than this Catalina Line, and those were discussed first and completed, and at that time we were familiar with these letters that had passed between the Commission and the Air Lines. Mr. Laughlin [fol. 325] said to Judge McKeage that we had been em-

ployed by the Air Lines to be associated with the Chicago attorneys of the Air Lines and that we would represent the Air Lines and he said that he would like to know what the Commission was going to do.

So Judge McKeage said that they had been considering the matter and that they planned to institute an inquiry—maybe the word is investigation—I rather think it was—an inquiry and investigation into the matter of the Catalina Air Line, and that if they found as a result of that investigation that the Air Lines had been collecting rates and fares which had not been filed with the Public Utilities Commission of California, the Public Utilities Commission would proceed to have actions brought to recover the penalties prescribed by the Public Utilities Act. He said that the Air Lines would have notice of any proceeding that was instituted or any inquiry or investigation that was instituted. He also said that they were fully aware of the fact that the Public Utilities Act did not name Air Lines in the penalty provisions of the Act, but he said that he was satisfied—they were satisfied that they could handle that matter.

I think that was it, practically the total conversation on the subject.

Q. In respect to these investigations, inquiries, you have an opinion as to what it would cost the company to handle such an investigation and carry the matter through all the [fol. 326] Courts to a final adjudication and determination thereof?

A. Yes, I think I have a general idea.

Q. What would that be?

A. Well, it would be far in excess of the $3,000.00 that we talked about.

Mr. Kelley: That is all.

Cross-examination.

Mr. Phelps:

Q. Now, Mr. Treadwell, I would like if you were able to, go back to certain events that preceded this conference which you just described, if you would. You are familiar,

I take it, with a decision rendered by the Commission, No. 45624, reported at 50 California Public Utilities Commission Reports?

A. Yes, I am familiar with it.

Mr. Phelps: Your Honors please, may I ask that these be received. They are advance sheet copies of that decision of the Commission and I will give Mr. Treadwell one for your present purposes, if I may.

A. I was not the attorney in that matter.

Mr. Phelps: Yes, I understand that, Mr. Treadwell. I will come to that in a moment. I think you said, though, that you are presently familiar with that decision.

A. Yes, sir, that's right.

Q. And I think you are also familiar with the fact that the [fol. 327] Commission's decision in that case was made the subject of a petition for a writ of review by United Air Lines to the California Supreme Court?

A. I understand that that was done. I was not a party to that.

Mr. Phelps: May I ask the Court to take judicial notice of the action of the California Supreme Court on that petition, which is recorded at 37 A. C.,—it is Advance California—633.

Q. Is it not true, Mr. Treadwell, that the California Supreme Court declined to review the Commission's decision?

A. Yes, they declined to review it.

Q. And thereafter did United Air Lines take an appeal to the United States Supreme Court?

A. They did.

Q. And that appeal was dismissed, was it not, by the United States Supreme Court?

A. That is my recollection as to how the matter was handled.

Mr. Phelps: May I ask that the Court take judicial notice of the opinion of the United States Supreme Court—rather the action—there was no opinion handed down—reported at 96 Lawyers' Edition Advance Opinions, page 228. That

decision was handed down, decision of the United States Supreme Court, on January 7th, 1952.

[fol. 328] Q. Now I think you indicated, Mr. Treadwell, that in that litigation United Air Lines was not represented by your office?

A. That's correct.

Q. They were represented, were they not, by a firm of attorneys in Los Angeles by the name of Trippet, Newcomb & Thomas?

A. That's correct.

Q. Now on or about January 23, 1952, was there not a complaint for certain penalties filed in Superior Court of the County of San Mateo in the name of the People of the State of California against United Air Lines and brought by the attorneys for the Commission?

A. That's correct.

Q. I will ask you to accept for present purposes the date of January 23 and I will introduce evidence of that date later on.

A. I think that is the correct date.

Q. Now it was at some time subsequent to the filing of that complaint, was it not, Mr. Treadwell, that your office was first retained by United Air Lines to represent them in this matter or in various matters involving the relations with the Commission?

A. It came in very closely around there. Of course I know it was before the 27th of February that we were employed.

[fol. 329] Q. May I ask you to assume for the moment —I will introduce evidence of it later—that it was some time between February 6th and February 27th that your office was retained by United Air Lines?

A. Subject to correction I will accept that at present.

Q. I think you indicated that prior to this conference of February 27 that you had some communication with someone in the Commission's legal division in order to arrange that conference, is that correct?

A. Yes, I think I contacted Judge McKeage personally. I am pretty sure that was the way it was handled.

Q. And I take it that you arranged at that time for the conference that took place on February 27th?

A. Yes.

Q. Now, Mr. Treadwell, you have before you, I think, a copy of the Commission's decision, 45624, to which I have referred, reported at page 563 of 50 California A. C. May I ask you to turn, please, to page 573 in this pamphlet and to refresh your recollection as to the contents of paragraph 2 of the order in that decision.

A. Now, you haven't made it clear. You ask if I was familiar with this. This has nothing to do with this Catalina.

Q. I understand.

A. What do you want me to look at, paragraph 2?

[fol. 330] Q. Paragraph 2. That is the paragraph, is it not, in which the Commission ordered United Air Lines and certain others to make reparation of certain fares.

A. Well, I would like to make an objection to the matter as being entirely immaterial. It referred to coach fare. That is, in this decision. It had to do with a coach fare, Your Honors.

Mr. Phelps: If Your Honors please, if I may be heard a moment as to the purpose of the question. I am only trying to have described for the record certain events which preceded this conversation and which I think may have been the cause of its being arranged and the subject matter of it. I think it is important for the Court to know some of these events that preceded this conference.

The Witness: Well, of course I thought that you might be trying to prove some estoppel or some——

Mr. Phelps: I assure you I am not, Mr. Treadwell.

The Witness: Or res judicata, or something. I don't think there is any harm in the Court knowing about it.

Judge Orr: You are withdrawing your objection?

The Witness: I will withdraw the objection, with counsel's statement.

Mr. Phelps:

Q. Well, having in mind, Mr. Treadwell, paragraph 2 of that order and having in mind the fact that this penalty action had been brought on January 23, can we not con-



[fol. 331] clude that those were matters with which you were then concerned?

A. Yes. We understood the matter. We were not attorneys in the matter of the coach fare at all.

Q. I understand.

A. But to supplement possibly what I have already said, I am pretty sure that we told you, Judge McKeage, that we would handle it, be associated in the matter of the reparations demanded by the State in regard to the coach fare.

Q. And you also had some conversation, had you not, involving as the subject matter this pending penalty action, had you not?

A. I don't think that we discussed it, except in one particular. Judge McKeage voluntarily told us that he knew all about the fact that the Air Lines were not named in the Act regarding the penalties, and we made no comment. We knew that, too. And it has since been decided by the Superior Courts that the Air Lines are not liable to the penalty. They have discussed it to that extent. Also it was discussed, to this extent, that we asked for an extension of time to put a pleading into the complaint and Judge McKeage very nicely granted that on our behalf.

Q. Yes. You had previously prepared a stipulation extending the time within which the defendant in the penalty action might file a pleading, had you not?

[fol. 332] A. That's right.

Mr. Ozment: Your Honors, without objecting at this time, may I inquire from counsel as to where this inquiry is leading us? Mr. Treadwell already testified as to why he attended this conference, and it seems to me that most of these matters are wholly irrelevant and are unnecessarily cluttering up the record.

Mr. Phelps: I should like to be heard on that, if Your Honors please, before ruling is made.

Judge Orr: We are a bit confused just where this evidence is leading us. As we understand it, the testimony of Mr. Treadwell was for the purpose of showing that a statement—I don't know whether it would be a threat or not—was made on the part of the Commission to make an investigation and take appropriate action on these penalties.

Your purpose is for what; what do you want to show?

Mr. Phelps: It seems to me, if Your Honors please, that what occurred at this conversation is of very considerable importance here. It would seem that that conversation is being used by the plaintiffs as the evidence in support of the allegation appearing in the complaint that these defendants have threatened to bring penalty actions and many other dire things. So I would like to explore thoroughly the circumstances of that conversation, what was said, who was present, and bring before this Court as completely as is [fol. 333] possible to do all of the circumstances surrounding that conversation.

Judge Orr: You take the position that there was no threat then to take action to collect these penalties?

Mr. Phelps: Indeed we do, Your Honor.

Judge Orr: And the purpose of your cross-examination, you think, is to show that the statement as testified to by Mr. Treadwell did not have that effect? That is, as to the conversation as a whole—looking at the conversation as a whole?

Mr. Phelps: Yes. And Mr. Treadwell's recollection of what was said is not quite accurate.

Mr. Ozment: Your Honor, I gathered that counsel in effect is saying that Mr. Treadwell mistakenly thought that the statement which was made to him applied to the Santa Catalina operation, whereas counsel apparently concludes that it applied to something else. If that is his point, I suggest that he simply ask Mr. Treadwell about that and let's get on.

Judge Murphy: This case isn't going to be decided on the resolution of whether a threat was made or not. Is it?

Mr. Phelps: Well, it seems to me, Your Honor, that is an important issue.

Judge Murphy: I don't think it is.

Mr. Phelps: In view of this complaint here, which rings [fol. 334] with the allegations of irreparable damage to these plaintiffs, and with the nature of the threats that have been made by the defendants here, it seems to me that it is important. Those allegations have been denied and made issues of fact. It seems to me important for us to know

what the facts were as to what occurred between the Commission and the plaintiffs.

Judge Goodman: If the State of California has not made any threats to enforce the Statute, why are we here listening to this case? If you say you are not going to do that, why then, we will dismiss this action. It seems to me a lot of unnecessary waste of judicial time, if that is the case. If the State of California does not intend to enforce the Statute against the United Air Lines, why, then, there is no occasion for us hearing the matter, and if you state the State of California is not going to take steps it is claimed they are going to take, why, that will be the end of the matter, the case becomes moot.

Mr. Phelps: Well, if Your Honor please, if you are prepared to hear me on that at this moment, I would be glad to be heard. I did plan to call to the stand Judge McKeage, the Commission attorney and chief counsel, and have him state not only what he intended to do prior to the time this action was brought but what he would do in the event this Court declined to grant relief requested, and to describe [fol. 335] exactly the nature of the action the Commission would take.

Judge Murphy: That is all we are interested in.

Judge Goodman: That is all we are interested in hearing. If the State of California isn't going to assume jurisdiction, isn't going to take any steps that might involve the necessity of deciding the question of whatever the State or Federal Government has in these matters, there isn't any occasion for us to take any action, and I suppose under those conditions Mr. Treadwell would go away very happy then.

Mr. Phelps: I did not mean to mislead, Your Honor. I did not mean to say that the Commission was planning to take no action whatever in regard to this Catalina flight, but that the action which it has contemplated and now contemplates is a wholly different kind of action from that alleged in this complaint.

Judge Murphy: Why don't you tell us what this is right now and save us a lot of time?

Mr. Phelps: I shall be glad to call Judge McKeage.

Judge Murphy: I don't require any testimony. You are

here representing as counsel. If you will tell what it is, we will know what it is and we won't be listening in the dark.

Mr. Phelps: Very well. I think Judge McKeage would [fol. 336] testify, and I think I can say as counsel, that had this complaint not been brought the Commission would have brought an investigation on its own motion into the operations and practices of United Air Lines and the other plaintiff, Catalina Air Transport, hold a public hearing, after notice to parties, and determine for itself after that hearing and after argument whether or not under all the circumstances and under all of the law applicable whether it had jurisdiction. If it decided that it did not have jurisdiction, which is a possibility, Your Honors, that would end the matter. If it decided that it did, then presumably the aggrieved parties would file a petition for writ of review to the California Supreme Court and if the California Supreme Court reversed the Commission's decision, presumably that would end the matter. If the California Supreme Court affirmed the Commission's decision, presumably the plaintiff would take the matter to the United States Supreme Court and there you would have the final determination of the matter. If the United States Supreme Court affirmed the Commission's jurisdiction and the Commission's decision, the Commission then would allow a reasonable time to the parties to file their tariffs covering this Catalina operation. Presumably the parties then would be quite willing, once the matter had been decided, to file those tariffs and there would be no necessity then for any further action by anybody and it would be only in that [fol. 337] remote unlikely event that after a final determination of the matter by the United States Supreme Court that these parties wilfully refused to file their tariffs that the Commission then would consider what further action should be taken.

Judge Goodman: The upshot of that is, you say, there is no ground for the equity injunctive relief at this time?

Mr. Phelps: Precisely.

Judge Orr: What about the penalty between now and the determination?

Mr. Phelps: I think I can say——

Judge Orr: What about that?

Mr. Phelps: I think I can say for Judge McKeage that the Commission would not consider—would consider it unthinkable to bring any penalty actions against these parties.

Judge Orr: It seems to me——

Mr. Phelps: Pending final determination.

Judge Orr: I get the idea here, the concern of the Air Line Company is this, that during the pendency of this action and the long drawn out litigation which may ensue that those penalties are building up all the time and that the Commission would then, in the event they were held that the Commission had authority, that they would be liable for all of these penalties which accrued in the meantime.

[fol. 338] Mr. Phelps: That is a wholly unfounded apprehension, Your Honor.

Mr. Murphy: Why couldn't the parties settle that between themselves and avoid this litigation at the time?

Judge Orr: I think——

Mr. Murphy: Why not go ahead and hold your Commission hearing and so stipulate that——

Judge Orr: May I interrupt? May I ask a question of Mr. Treadwell here, please? Isn't that your concern, that these penalties are building up in the meantime?

Mr. Treadwell: That is certainly one of our concerns, Your Honor.

Judge Orr: It is one of the greatest, isn't it?

Mr. Treadwell: One of the greatest. In this suit that they filed in January, in which—and which we knew about at the time we held this conference—they sued the company for $138,000 on an allegation that—and a finding by the Commission itself—that the rates were put in force by the company for 69 days.

Judge Murphy: Can't you enter into a stipulation with respect to those penalties?

Mr. Phelps: I am not sure I understand what you mean by "with respect to these penalties".

Judge Orr: Stipulate to the effect that the Commission, in the event it is finally determined by the Courts that they

[fol. 339] have jurisdiction thereof, will not proceed against the Air Line Company for penalties which may have accrued theretofore.

Mr. Phelps: I think so. I would like to consult for a moment with chief counsel on that.

(Off the record discussion, beyond the hearing of the Reporter.)

Mr. Phelps: Yes, Your Honor, we freely stipulate that the Commission would bring no penalty actions against United Air Lines or Catalina Air Transport with respect to their failure to file tariffs covering this Catalina operation, except in the sole circumstance that after a final determination of the jurisdictional question which would be resolved in favor of the Commission's jurisdiction that then these parties refused, after a reasonable time, to file the tariffs, would such a penalty action be brought or considered?

Judge Goodman: And then only for the period following the wilful refusal?

Mr. Phelps: Following the wilful refusal, yes, Your Honor.

Judge Murphy: Are you willing to accept that stipulation, Mr. Treadwell?

Mr. Treadwell: No, Your Honor, I am not. The penalties are not a matter of the Commission. They are a matter of the State of California. The State of California is entitled to any penalties and they can only be recovered [fol. 340] by an action in the name of the people of the State of California or litigated, and the Commission is not given any discretion at all. It is required to collect the penalties and bring suit in the name of the people of the State, and its attorneys are given power to use the name of the State to recover the penalties. They have no power to make any such stipulation.

Not only that, Your Honor, this matter of threats is entirely material. This is an action for declaratory relief. We are entitled to declaratory relief against these charges. and I couldn't make any such stipulation here. I would have to consult my clients.

Judge Goodman: Mr. Treadwell, in an action for declaratory relief you would have to show that there was a factual controversy, and this statement to the Court would indicate that there is no factual controversy, at least concerning the subject matter which is the basis of your action for equitable relief, namely, that some action is going to be taken.

Mr. Treadwell: Well, the controversy is whether they have power to regulate this route and regulate the rates.

Judge Goodman: That is only an academic controversy. The Courts are not here to determine academically whether the United States or the State has jurisdiction, but only to resolve a controversy that might arise. Now, if the controversy does not exist, there is no basis for a judi- [fol. 341] cial action. Isn't that true?

Mr. Treadwell: The controversy, Your Honor,—. I have introduced, though I haven't read here, letters from the Commission deciding this thing their own way and saying that they claim the right to regulate the rates. That is the controversy.

Judge Orr: I understand they are going to take Court action. They are not deciding it their own way. They are going to take Court action. They will make a determination and you will take it to the Courts to determine whether that is correct or not.

Mr. Treadwell: You can't even take it to the Courts. The only thing you can take to the Courts is where confiscation is involved. You can't get into Court at all. No Court can review the order of the Commission. It just stands for what it is worth and you can't go to Court on anything except confiscation under the Constitution of California.

Judge Orr: You mean an order of this Commission is not reviewable?

Mr. Treadwell: No, Your Honor, it is expressly provided by the Constitution that it is only reviewable on the question of confiscation, not reviewable on any other ground.

Mr. Phelps: May I be heard on that, Your Honor? It is [fol. 342] incomprehensible to me that Mr. Treadwell——

Judge Orr: You gentlemen can sit down.

Mr. Phelps: Mr. Treadwell has said it on argument on prior occasions and he has said it in his brief and he is

saying it again. I can't understand it. There is an express provision in the Public Utilities Code, if Your Honors please, providing machinery for review of Commission decisions. I will refer you to the sections. I think it is appropriate to read it right now because we have had repeated assertions from Mr. Treadwell that there is no review of Commission decisions.

Mr. Treadwell: While you are looking for that——

Mr. Phelps: I have it.

Mr. Treadwell: ——I can say other things. There are all kinds of remedies, Your Honor, that the Commission has. Penalties is not the only one. They can sue you for reparations, make us repay all the rates that we had collected since 1938 to the present time. They also are permitted to impose interest and also damages in the way of vindictive damages that they can hold us to also. None of those things has the Commission any power to give up. They haven't any power at all. If this thing is going to come up as a proposition for a stipulation, why, naturally I would have to submit it to my clients.

Judge Goodman: Do you see any reason why you couldn't [fol. 343] do that?

Mr. Treadwell: I don't see any reason why we should do it.

Judge Goodman: The same people that you say made the threats which are the basis for your demand for equitable relief now say that they are not going to do the things that they threatened to do, the very same people.

Mr. Treadwell: Well, as I say, Your Honor,——

Judge Goodman: So by that same token, if the basis of your equitable action is a threat that counsel for the Commission made, and I would think that since we are sitting here in equity, that their statement that they are not going to do that would pretty well knock the props out from the basis of the demand for equitable action, wouldn't it?

Judge Orr: I don't quite get your theory, Mr. Treadwell. You allege in your complaint that this Commission is going to do certain things. Now they are willing to stipulate they won't do it. You say, no, that they are not in a position to deny the allegations that they are going to take this action.

Mr. Treadwell: That is the position I take, that they have no power, that they have power to do just a certain thing, Your Honor, that they have a power to collect by suit in the Superior Court these penalties, reparations and interest and vindictive damages.

[fol. 344] Judge Murphy: Where is the requirement that forces them to sue if they do not care to?

Mr. Treadwell: The Statute says they shall collect these penalties.

Mr. Phelps: I should like to be heard on that, if Your Honor please.

Judge Murphy: If they arrive at a conclusion there are no penalties due——

Mr. Treadwell: Oh, yes, that would be all right, that is just what they don't do.

Judge Murphy: They said they, as I understood, Mr. Treadwell, Mr. Phelps said they contemplate an investigation to determine that. Isn't that correct?

Mr. Phelps: Quite, Your Honor. We do not consider that there are any penalties due at the present time.

Mr. Ozment: Your Honor, might I be heard?

Mr. Treadwell: I didn't quite get that. You say—. Would you just read that, Mr. Reporter?

Judge Orr: Read that statement of Mr. Phelps.

(Thereupon the Reporter read statement of Mr. Phelps: "Quite, Your Honor. We do not consider that there are any penalties due at the present time.")

Mr. Treadwell: Well, Your Honor, counsel in the same situation has an appeal pending from this case that they [fol. 345] brought suit for penalties, which they lost, and they are still appealing and arguing on their appeal that the penalties are due.

Judge Murphy: That is some other situation, however, isn't it?

Mr. Treadwell: The situation is just the same. The question is whether the act makes the Air Lines liable. Now he is saying that he is conceding that whole thing. I can't believe that he means it because he has written a very elaborate brief.

Judge Murphy: Well, suppose we let him be heard on the subject.

Mr. Ozment: We have a much more fundamental objection to what is being said here. Our position is that the Commission now stands in open Court saying that they will institute a proceeding before themselves, that that and that alone is enough to warrant and require the Court to act in this matter. The burden of appearing and defending before the California Commission is sufficient. Mr. Treadwell has testified that this is to be considerable expense. In support of that point we rely on three rather recent Supreme Court cases involving this type of situation. We have prepared a supplemental memorandum, which, if the Court will accept at this time, which we'll present and I think perhaps will be a little easier to see the basis of [fol. 346] our argument on this point. The first of those cases is Brice against Santa Fe Elevator Corporation, and there a complaint was filed with the Illinois Regulatory Commission. The Utility against whom it was filed moved to dismiss the complaint on the ground of lack of jurisdiction. The Illinois Commission refused to dismiss on the ground of lack of jurisdiction. It went ahead to determine their jurisdiction in the matter. And the parties immediately went into a Federal Court and sought and obtained both declaratory and injunctive relief on the ground the Federal Government had preempted the field of regulation.

A very similar case is the Public Utilities Commission of Ohio against United Fuel Gas Company. There much the same thing happened. The Commission refused to dismiss their proceeding and directed the utility to appear and defend. And the Court said that since there was—it would cost the company $3,000 to respond to the directive of the State Utility Commission that the case properly instituted and maintained and relief was properly granted.

And in the same vein we have a third case, Bethlehem Steel Company against New York State Labor 330 U. S., where the Federal Court took jursdiction in connection with the issuance of a subpoena.

This case is ripe for decision. The Commission stands stating it will institute a proceeding, and we submit that [fol. 347] that and that alone is enough for the Court to

take and decide this case either on the basis of declaratory or injunctive relief. We are not greatly concerned as to what form the judgment will take.

Judge Orr: That is a different angle.

Mr. Phelps: If we may have the privilege of replying to that, Your Honor. I would like to take Mr. Treadwell's points first. I was going to read the provisions of the California Public Utilities Code providing machinery for review of Commission decision. Section 1756 is as follows:

> "Within thirty days after the application for a re-hearing is denied"——

That is re-hearing by the Commission——

> "or if the application is granted, then within thirty days after the decision on re-hearing the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on re-hearing inquired into and determined."

Section 1757 is as follows:

> "No new or additional evidence may be introduced in the Supreme Court but the cause shall be heard on the record of the Commission as certified to by it. The review shall not be extended further than to de-
> [fol. 348] termine whether the decision has been rendered pursuant to its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review except as provided in this Article. Such questions of fact shall include ultimate facts and findings and conclusions of the Commission on reasonableness and discrimination."

The exception just referred to appears in Section 1760, which is as follows:

> "In any proceeding wherein the validity of any order or decision is challenged on the ground that its violates

any right of the petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts and the findings or conclusions of the Commission material to the determination of the Constitutional question shall not be final."

Now that seems to be, Your Honor, and affords a complete method of review of any Commission decision, which I may say has been made use of many times. We have 15 or so cases now in the California Supreme Court involving review of the Commission's decisions. If the Commission' [fol. 349] proceeds first by way of seeking a penalty action, then the matter proceeds in the usual way, through the hierarchy of the California State Courts, reviewed to the District Court of Appeal, and with the possibility of a transfer to the California Supreme Court under certain' circumstances.

So no matter what the Commission does, whatever action it may take, it is open to adequate review in the courts of the State of California.

So I am utterly unable to understand how Mr. Treadwell could have overlooked the sections I have just read.

Mr. Treadwell: Would you read the Section of the Constitution which refers to confiscation?

Judge Orr: Maybe you can argue that, Mr. Treadwell.

Mr. Phelps: I am fully aware of that Section. Mr. Treadwell, it is true there is a section of the Constitution that contains absolute prohibition against transportation companies raising any rate without a prior showing before the Commission that an increase is justified, and then it goes on to say: "And the finding of the Commission on that question shall not be subject to review except on the question of confiscation."

It is restricted entirely to the question of increases in rates, and it is by no means intended to restrict review of Commission decisions on other matters.

[fol. 350] Now Mr. Treadwell has indicated that the Commission has no alternative but to bring a penalty suit, that it has a duty. It may be, Your Honors, that the statute is couched in terms of a duty, but as a practical matter

we all know that the Commission of necessity must exercise discretion in the matter of bringing these penalties. If they were bound to bring a penalty action for every transgression of every provision of the Public Utilities Act, well, I assure Your Honors there would be literally millions of such penalty actions at any given time. So the practical necessities of the situation are such that the Commission must, and always has, and I am sure always will, exercise its judgment as to whether or not penalty actions are appropriate in a given set of circumstances.

And when I have stated, I think, on behalf of Judge McKeage, that the Commission—and have offered to stipulate that the Commission would not bring these penalty actions except under the circumstances I have described, I am sure that no one could ever successfully challenge the Commission's right to exercise that kind of discretion.

Now if I may reply to what——

Judge Orr: Do you want to reply to Mr. Ozment?

Mr. Phelps: Yes.

Judge Orr: Well, we will have a ten minute recess.

(Short recess taken.)

[fol. 351] Judge Orr: We might indicate to you that we see no reason to go further, have further evidence on the question of whether or not the Commission is going to impose penalty or what action they are going to take, other than the situation os advanced by counsel for the Government as to whether or not an investigation, if instituted by the Commission, or threatened investigation, would be of such character as to warrant intervention by this Court. We think that the representation as made by the California Public Utilities Commission as to those other matters would be sufficient to warrant this Court in denying relief along those lines.

However, the other matter which counsel for the Government has advanced here on the question of whether or not the mere fact of requiring the air lines to appear in an investigation would be sufficient to require the intervention of this Court, if they make an investigation, why, I suppose as to whether or not the air lines would appear there, would be a matter for them to decide, but we are not

familiar with those cases which have been cited here, and we would of course like to become familiar with them. We see no reason to take up the time of this Court on those other matters, in view of the representation which has been made to this Court.

Mr. Phelps: Very well, Your Honor. Would you like to [fol. 352] hear me in argument now on the question of whether or not the Court should entertain requests for declaratory relief as indicated by counsel for the Civil Aeronautics Board?

Judge Orr: On that one question as advanced by counsel for the Civil Aeronautics Board.

Now, if counsel for the air lines wants to argue that point, why, they may do so, and if they want to take——

Mr. Kelley: He is through with Mr. Treadwell now.

Judge Orr: Now if you want to participate in this argument, Mr. Treadwell, you may.

Mr. Treadwell: I would like to be heard briefly. I recognize Your Honors' efforts to solve this case. The facts of the situation are simply these, that the Commission raised this question of its jurisdiction over this route. They decided it apparently because the Commission wrote letters saying that they had jurisdiction, and they informed us that they were going to exercise that jurisdiction and we bring this suit.

If there were no penalties at all—that is just an incidental—of course, it is a very important incident, as Your Honor said to me, and I said to Your Honor that that is one of our troubles, but it isn't the only trouble. This is the thing that should be settled. We should know who controls this route and whom we have to look to and who has the right to say what rates we shall collect, and there [fol. 353] is ample jurisdiction of the Court for a declaratory judgment even if it were not for injunctive relief.

But I don't think there is anything in that either. In other words, they could come in and we would have a situation where all kind of liability is involved. They can—there is liability for the rates you collect—they can all be sued for and recovered; there is interest. And so we bring this suit.

Judge Murphy: But, Mr. Treadwell, the State of California has changed its position now.

Mr. Treadwell: Well, has it, Your Honor?

Judge Murphy: They come in now and say they are not going to do this until they have a hearing now and investigate the matter. So you are no longer confronted with the so-called threat or claim of jurisdiction which is contained in these letters attached to the stipulation.

Mr. Treadwell: At the time we brought this suit there was no question that they were threatening to do these things, do anything that was——. Now they come in and they ask in their answer, say in their answer that they are not going to collect the penalties until it is determined on a hearing. Now they come in on the trial and say something entirely different.

As I understand it, so there won't be any mistake about it, what they are suggesting is that they will not take any [fol. 354] proceedings to collect any penalties until there is a final decision in some proceeding that they are going to commence, and when they do impose any penalty they won't impose any penalties except such as that accruing after such a final decision and a contumacious refusal on our part to do so.

Judge Orr: That is the way we understand it.

Mr. Treadwell: Yes.

I say, Your Honor, that it might seem that such an offer as that, I ought to accept it. I don't accept it, Your Honor, because we want nothing but what the law is.

Judge Orr: What you want is protection.

Mr. Treadwell: What we want is protection.

Judge Orr: From any action which they—any threatened action, and if there is no threatened action, then you are protected.

Mr. Treadwell: Well, I can't say if there isn't any, because I don't think they have any power at all to make any such a stipulation.

Judge Orr: Suppose this Court determines from the evidence in the case what the situation is; suppose this Court is of the opinion that the proceedings of this Commission here in open court and the statement outweighs your testimony that at a certain time they said that; then the Court

would say that you have not prevailed in your assertion [fol. 355] on that point.

Mr. Treadwell: Well, if on that point——

Judge Orr: That your apprehensions as to what might they do has not been established; that we take in good faith the statement of this Commission that they are not going to do anything of that kind and had no intention of doing it—which we must weigh in the balance with your statement that at a previous time some other assertion was made.

So that is the position we take.

Mr. Treadwell: Of course, Your Honor, if it is a question of my entering into a stipulation, I would necessarily want time.

Judge Orr: you wouldn't—why would you—why would you need to enter into any stipulation at all? What we are talking about is a statement to this Court denying and stating that they are not going to go into these things. You wouldn't need to be a party to that.

Mr. Treadwell: Of course, it is a new law suit, as far as I am concerned. They coming into court today and trying to get out of the case and get the case disposed of in a certain way, it is just as harmful if it is done by the Court as if it were done by them to me. But I want time to consider it.

Judge Orr: Would you like to argue that other point [fol. 356] now, Mr. Treadwell, the question of the mere fact that they will conduct an investigation, will that be sufficient to require the intervention of this Court?

Mr. Treadwell: It will be ample, sufficient. I have seen cases that the Government has cited. This thing does not depend upon the penalties, the penalties alone. The fact is that there is a dispute that arises here, the fact that Congress wanted to provide a way by declaratory judgment that these disputes could be disposed of, and we are here in court asking for it. Just because they come in and make this stipulation, that does not give us the adjudication on the merits of the question, and that is what we are here for.

Judge Goodman: Well, suppose the Commission has a change of heart, Mr. McKeage and his associates decide

that maybe the State shouldn't exercise jurisdiction here at all, after they conduct this hearing, and you don't have any trouble on that score. You are not hurt until the dog really bites. He may bark at you a little bit, and he turns out to be not as ferocious as he seemed to be.

Mr. Treadwell: Far from me to——

Judge Goodman: What have you got to complain about then?

Mr. Treadwell: Well, Your Honor, I have the old idea: "Beware of the Gods"——

[fol. 357] Judge Murphy: "Who bring gifts".

Mr. Treadwell: "—that come with gifts." They are not giving me anything, Your Honor. They brought this suit for $178,000.

Judge Orr: Against whom?

Mr. Treadwell: Against the United Air Lines.

Judge Goodman: That did not involve the route to Santa Catalina Island.

Mr. Treadwell: It didn't, but it involved the Civil Aeronautics Board. The President of the Civil Aeronautics Board, the Chairman of the Board, asked that the rates be put into effect. The company put them into effect. The Utilities Commission itself found that that was deemed a demand to put them into effect, a demand that they had to obey, and they put them into effect, and then the Utilities Commission brings the suit for $138,000, $2,000 a day, because the rates which they had held were reasonable and were required and that were put into effect on the demand of the Civil Aeronautics Board, but still we should be charged $138,000.'

Judge Orr: Had they ever made in that case any representation to the Court that they would not take certain action?

Mr. Treadwell: No, Your Honor.

Judge Orr: That differentiates this case from that.

[fol. 358] Mr. Treadwell: It doesn't in my way of thinking, Your Honor, because there is no extent that they won't go to if they legally can, and this is not criticism for a public official if he goes as far as he can, and he could repudiate this. But if it is a question as to whether we should stipulate to anything of that kind, I would want time,

Your Honor, to have this matter go over to some future time.

Judge Orr: I guess you are rather anxious to get it completed?

Mr. Treadwell: I am very anxious to get it completed, Your Honor, but we have done tremendous work in this case. They presumably have done tremendous work. To through the case out without any decision on some promise or other that they will do something that seems liberal, I don't think is right. So I know what Your Honor's are trying to do is what is right and fair and——

Judge Orr: It isn't any indication of any promise or anything. It is a question here of evidence. You are asserting they are going to do these things and you are placing that solely so far on your testimony that they made that statement to you at a meeting. They now come in and say they are not.

Now, this Court can weigh that evidence and make a determination as to whom it believes under the circumstances. It isn't a question of throwing it out on any statement. It would be the question of throwing it out on a [fol. 359] lack of sustaining your point.

Mr. Treadwell: No, it isn't. They haven't said anything, Your Honor. They say that they claim that they had a right to regulate these rates of this line. They say that now in their answer before the Court. Well, isn't that what we want to get a decision on, whether they have that right or not to regulate these rates at all, and we come into court and ask to have——

Of course, the fact that they say they want to exercise penalties and collect penalties, of course, that is something, but it does not come to the thing that we are trying to decide.

Judge Goodman: But they now repudiate the statement. They have changed the statement that they made that they are going to assert jurisdiction because in effect they have changed their mind on it. They are first going to conduct a hearing before they make a decision on that.

Now until they decide that they are going to assert jurisdiction, is there any controversy?

Mr. Treadwell: Certainly, there is a controversy. You have the controversy if you don't get the final decision. The controversy isn't one that has to be decided in any one way. It can be decided either way. They say that they have, and we say that they haven't, and that is the [fol. 360] controversy.

Judge Goodman: Mr. Treadwell, wouldn't it be time enough to determine that question when and if the California Public Utilities Commission decides after a hearing that it is going to assert jurisdiction?

Mr. Treadwell: Even, Your Honor, after we had this conversation they never brought any proceeding to determine it. The penalties that have accrued in this matter amount to $730,000 a year.

Judge Orr: This one here?

Mr. Treadwell: This one here. This little line.

Judge Orr: It might be——

Mr. Treadwell: $730,000 a year has been accruing on this line.

Judge Orr: That would be evidence to me that you ought to be rather anxious, rather pleased to accept this statement because you don't know with any certainty that you are going to win this case, and then they might assert all of these penalties all the way back if you didn't win it. Now they say they won't do it on this other situation. It might mean $780,000 to you.

Mr. Treadwell: I am not saying——

Judge Orr: Unless you are absolutely positive that you are going to win. Of course, that would be a different thing. But the penalties that already have accrued, in the [fol. 361] event you lose, why, they are going to waive those.

Mr. Treadwell: What I am asking for now is that if my clients want to accept some kind of a thing of that kind as a substitute for a determination of this question, well then they ought to have the opportunity to do so.

Judge Goodman: Wouldn't they be protected if this Court made an order stating that: Dismiss this case for equitable relief upon the representation and statement of the officials of the State of California that the action that was threatened is not going to be taken now? What dif-

ference does it make whether you stipulate or whether your clients like it or not? The decree of the Court would still have some validity.

Mr. Treadwell: I have given my views, that it does not touch the issue at all as to what the right is, and that is what we are interested in.

Judge Goodman: Well, the answer to that is that if you do what I have seen happen a great many times in the Federal District Court, that people do come in and when they get a determination of their rights in advance and without any actual controversy then existing—and that is nice—I would like to do that too, as a lawyer—and it would be a good job for my clients if I could do that—but the courts are not here for that purpose. They don't decide those questions unless there is an actual controversy.

[fol. 362] Mr. Treadwell: Isn't the controversy still here as to who has jurisdiction?

Judge Goodman: It might have been at the time you filed your suit but it isn't now because they say they are not going to do the things you claim.

Mr. Treadwell: No, they don't. Excuse me, please, Your Honor. They say they won't collect penalties until it is finally decided and they say that when they do collect them——

Judge Goodman: They won't assert rights or collect penalties or take any action until it is determined whether or not they have jurisdiction.

Mr. Treadwell: In other words, they want to oust this Court of jurisdiction by simply saying that they are not going to do anything until they get around to deciding it. They have already decided it.

Judge Murphy: How would that oust this Court of jurisdiction? Couldn't you renew your action for the relief which you seek in the event that they decided adversely?

Mr. Treadwell: Well, I suppose I could.

Judge Murphy: Suppose that we were to postpone decision and thus retained your station until such time as the investigation is had and determined?

Judge Goodman: Following Judge Murphy's suggestion, how could you possibly be, or the litigants, if we retained

[fol. 363] jurisdiction of this matter and postponed it until we see—or until such time as it results whether or not the California Public Utilities Commission is going to take the steps that you attribute to them, and at that time you could renew your application.

Mr. Treadwell: Your Honor knows that they have decided—Your Honor knows that if they bring a proceeding, just exactly what they are going to decide.

Judge Murphy: We don't know that.

Mr. Treadwell: Well, I have put in evidence the letters here in which they have decided the whole matter, claim they have.

Judge Murphy: Well, upon the representation of Mr. Phelps, he stated very frankly that if an investigation were commenced it might well be that no further action would be taken. Is that correct?

Mr. Phelps: Yes, Your Honor, that's a possibility.

Mr. Treadwell: If Your Honor please, what I want to do, I ask that the matter go over for a reasonable length of time so we can discuss this matter, and give to the Court any——

Judge Murphy: Suppose we were to continue this matter sine die, until such time as the results of the investigation contemplated by Mr. Phelps are determined. Then if the result of their investigation is adverse to your position, [fol. 364] there would then be an actual controversy upon which we could act.

Mr. Treadwell: There is an actual controversy now. They haven't come in here and told Your Honors that they don't— The controversy is simply that there are two conflicting contentions. They make the contention that they are entitled to establish these rates and regulate them.

Judge Orr: Have you got any more evidence, Mr. Treadwell?

Judge Goodman: Aside from this?

Mr. Treadwell: No, Your Honor, we are through.

Judge Orr: No further evidence?

Mr. Treadwell: No.

Judge Orr: Mr. Phelps, would you call your witness and have him state to the Court what the position of the Commission is, as you have indicated?

Mr. Phelps: I would be glad to.
Judge Orr: All right.
Mr. Phelps: May I talk to him briefly?

(Discussion outside of the hearing of the Court.)

Everett C. McKeage was called as a witness on behalf of the defendants, sworn.

The Clerk:

Q. Please state your full name to the Court, sir?
[fol. 365] A. Everett C. McKeage.

Direct examination.

Mr. Phelps:

Q. You are one of the defendants in this case?
A. I am.
Q. What is your occupation?
A. I am the attorney and chief counsel of the Public Utilities Commission of the State of California.
Q. And how long have you been such?
A. I have been such since January 1944.
Q. I take it the title "Judge" derives from some prior experience that you had?
A. I was at one time Judge of the Superior Court of the State of California in and for the City and County of San Francisco.
Q. May I ask you, Judge, if there are set forth within a section of the Public Utilities Code a description of your duties as attorney and chief counsel?
A. Yes.
Q. I refer to Section 307 and ask you whether or not that is the section which in your opinion guides you in your discharge of your duties?
A. Those are the statutory duties that I perform.
Mr. Phelps: I think it perhaps might be well to read this so we have before us the limit of the duties and [fol. 366] responsibilities of the Commission's attorney.

Section 307, as follows:

"The Commission may appoint as attorney to the Commission an attorney at law of the State who shall hold office during the pleasure of the Commission. The Attorney shall represent and appear for the People of the State of California and the Commission in all actions and proceedings involving any question under this Paragraph or under any order or Act of the Commission. If directed to do so by the Commission he shall intervene, if possible, in any action or proceeding in which any such question is involved. The attorney shall commence prosecution and expedite the final determination of all actions and proceedings directed or authorized by the Commission, advise the Commission and each Commissioner, when so requested, in regard to all matters in connection with the powers and duties of the Commission, and the members thereof, and generally perform all duties and services as attorney for the Commission which the Commission may require of him."

Now if I may, Your Honor, I should like to make sure the record is clear in regard to an observation Judge Goodman made, that the Commission had changed it- position or attitude. I would like to inquire of Judge McKeage— [fol. 367] I think we can establish the fact that the Commission has not changed its attitude but that what has been said was perhaps misunderstood.

Judge Goodman: Before you do that, so that is clear, the answer of the defendants sets up certain issues in this case, and in addition by stipulation there was a letter attached in the file which stated that the Commission was enforcing jurisdiction, asserting jurisdiction, and requesting the plaintiff to file its schedules.

Mr. Phelps: That's correct.

Judge Goodman: Now you are stating that the Commission did not intend to assert jurisdiction until such *as* a hearing was had, and you also said it might be possible that they might come to the conclusion that they wouldn't assert jurisdiction. It was that which prompted me to say that a different statement had been made in court here

than was set forth in the answer, or by the pleadings. I did not intend, by that statement, to intimate that there was anything unfavorable or critical in saying that there was a change of position.

Mr. Phelps:

Q. I shall just ask the Judge to describe what the position of the Commission, with respect to this Catalina operation, was prior to the bringing of this suit and what it is now.

[fol. 368] Mr. Treadwell: We object to that, Your Honor. This is calling for the conclusion of the witness. The position of the Commission is shown by the answer which we are trying this case on. It shows exactly what it's position is, and it is also shown by the letters written by the Commission, the Commmission's Secretary, insisting in their right to regulate this line, these rates, and it is also shown in a certain way by certain testimony of mine. I don't think the witness could give his conclusion.

Judge Orr: The objection is overruled.

A. The intention—I can speak for myself, in the statutory duty that I perform, there was no intention on my part to bring penalty actions against this air carrier in connection with this Catalina operation. There was no intention on the part of the Commission to do so either. The only intention that was ever expressed was that if these rates were not filed that an order of investigation would be instituted where the question of jurisdiction would be determined in the orderly course of due process of law.

We have never changed our position. That was our intent then. That is our intent now.

Mr. Phelps:

Q. And may I ask you, Judge, if you will now confirm and ratify the stipulation or the offer to stipulate which I have previously made?

A. I do so.

[fol. 369] Judge Orr: Is that all, Mr. Phelps?

Mr. Phelps: That is all I have to ask the Judge. There is one thing perhaps I would like to ask.

Q. You have heard the testimony of Mr. Treadwell, Judge, as to what occurred at the time of that conference on February 27th. Now——

A. Yes.

Q. The Court has indicated that it does not wish to hear evidence at length on that question. But it may be important and perhaps I think the Judge ought to be given an opportunity to relate what his recollection of it is, as to what took place at that conference.

Judge Orr: Yes.

A. Briefly, the conference was called—at least my understanding of the conference—was to discuss the question of this decision that had awarded reparation against United Air Lines and other air lines, as to what was to be done about it. There was a change of counsel and Mr. Treadwell and Mr. Laughlin came up to see me about it. That was the principal thing discussed at that conference.

There was also discussed the question of the penalty actions that were then pending. The testimony that Mr. Treadwell gave as to a statement, that I said we would bring penalty actions concerning this Catalina run, I have absolutely no recollection of making any such statement, none whatsoever. As a matter of fact, I do not [fol. 370] recall a discussion of that particular matter.

Q. Would you say now, Judge, that you did not say that the Commission would commence penalty actions in regard to this Catalina operation if the company did not file its tariffs?

A. I have no recollection of discussing that particular thing. I wouldn't say that it was not discussed. But I have no recollection of discussing it. I can only answer your question by saying I do not believe I made any such statement.

Q. Do you think that you would have remember- saying that the Commission would commence penalty actions forthwith unless——

Judge Orr: Of course that is argumentative.
Mr. Phelps: You may cross-examine.

Cross-examination.

Mr. Treadwell:

Q. Judge, you have seen these letters that passed between your commission, through its secretary and otherwise to the air lines in regard to this route?
A. Have I seen them?
Q. Yes.
A. Yes, sir.

Judge Orr: Before you start your cross-examination, maybe we better take our recess now and come back this [fol. 371] afternoon.
Two o'clock. We will be in recess until 2 p. m.

(Thereupon an adjournment was taken to the hour of 2 o'clock p. m. this date.)

[fol. 372] Afternoon Session, Friday, November 21, 1952 at 2 O'clock P. M.

Everett C. McKeage was recalled as a witness on behalf of the defendants, resumed the stand, previously sworn.

Cross-examination resumed.

Mr. Treadwell:

Q. Judge McKeage, you were familiar with that series of correspondence that passed between the California Public Utilities Commission and the air lines in regard to the Santa Catalina route?
A. I am.
Q. And in those letters the Commission took the position that it had jurisdiction over the lines?
A. That's right.
Q. And was that the result of your advice?
A. That was the result of my advice.

Q. And if there was a Commission hearing, if the Commission held another hearing, you would give the same advice?

A. I would give the same advice. Well, of course, depending upon the special facts that came out in the hearing.

Q. If things were just the same as they were when you —when those letters were written, you would give the same advice?

A. If there were no different factual situation, it would be my opinion, as it is now, that the State of California [fol. 373] has jurisdiction, yes.

Q. You haven't brought any proceeding or investigation?

A. You mean in connection with this Catalina route?

Q. In connection with this.

A. No, we have not. As a matter of fact, Mr. Treadwell, some time in our later conversations I know that we did discuss that, and I know that I told you that we wouldn't press you on the matter because we were concerned about those reparation matters that we were trying to arrange a program on to get those reparations paid.

Q. You mean that at some time you told me that you would not press on the penalties?

A. Well, I told you we wouldn't press you on anything in connection with the—even in investigation or penalty. We wanted to get the reparations matter fixed up first. That is what we were primarily interested in.

Q. And you have never brought any proceedings?

A. No, we have not.

Q. You are still carrying on litigation against the air lines in relation to the question whether they are liable for penalties?

A. In those other proceedings, yes.

Q. In the other proceedings?

A. Yes.

Q. They are still carrying those on?

[fol. 374] A. That's right.

Q. Now we have had a little disagreement apparently as to what took place at that conference in February. What do you say took place there?

A. The entire conference?

Q. In regard to the Catalina matter.

A. As I testified this morning, I have no recollection of even discussing that at that conference, and, as I stated, the paramount thing was the question of the payment of the reparations p-rsuant to that final decision rendered by the Commission, and I know that you also brought up the matter of the pending penalty actions that grew out of that particular proceeding. I have no recollection of the Catalina matter being discussed.

Mr. Treadwell: That is all.

Mr. Osment: No questions, Your Honor.

Mr. Phelps: I have nothing further.

Judge Orr: That is all.

(Witness excused.)

Judge Orr: Any further evidence?

Mr. Phelps: I have nothing further, Your Honor.

Mr. Ozment: No.

Mr. Treadwell: We have no further evidence.

Judge Orr: Do you want to argue, gentlemen?

Mr. Treadwell: I would like to argue the matter.

[fol. 375] Judge Orr: We would like to have you confine yourselves to the fact of whether or not the purported investigation of the Commission which might or might not require your appearance and defend, there is sufficient grounds for the intervention of equity, and issuance of a restraining order.

Mr. Treadwell: We don't consent to that, Your Honor.

Judge Orr: What's that?

Mr. Treadwell: We don't consent to that, Your Honor.

Judge Orr: All right. If you will confine yourself to that phase of it.

Mr. Treadwell: We want to argue the questions that we believe are material in the case. We don't want to be limited——

Judge Orr: I am sorry, Mr. Treadwell, I didn't get what you said there.

Mr. Treadwell: We have certain ideas as to what are material to this case.

Judge Orr: Oh, yes.

Mr. Treadwell: And those we want to present. We want to do it briefly, because Your Honor's have already allowed part of the argument that far along, but we don't want to consent that that is the controlling question in the case. Therefore we don't consent to being limited in our argument.

Judge Orr: We have indicated to you what we think of it. Now if you want to take the lead and see if you can [fol. 376] change our mind, why, go ahead.

Mr. Treadwell: Why, that has frequently been done, Your Honor.

ARGUMENT BY MR. TREADWELL FOR PLAINTIFF

There is a broad question in this case, Your Honors, You have two governments, the United States Government and the State government. You have two bodies, one the State Utilities Commission and the other the United States Civil Aeronautics Board. And it does not make any difference what conversations took place and what was done, your Honors can have no doubt nor can I have any doubt, nor can counsels for the defendants have any doubt, that those two bodies are diametrically opposed to the meaning and effect of the Act known as the Civil Aeronautics Act.

One of them says that that Act expressly by language that is plain, clear, gives jurisdiction over that route to the Civil Aeronautics Board. The other, just as much in apparent good faith says that that Act does not give jurisdiction to the Civil Aeronautics Board but that jurisdiction is in the Public Utilities Commission.

Now that is what this Court was put here for, to determine controversies between parties and between governments and between states and between executive and administrative bodies of those states, and even of the nation.

There isn't any question of any change of heart on that subject. If you have a hundred hearings you can't change [fol. 377] Judge McKeage.

I have the greatest regard for Judge McKeage. I have generally great regard for any judicial officer. But I have a personal one for him, that is deep and covers many years, and I don't know any man whose opinion I would rather accept than Judge McKeage's opinion. But you know and

I know that this question is a question, not an abstract question, but a question that has to be decided. You can't have two people regulating and governing the same proposition. You can't have two bodies establishing rates for the same utility. It is just an absurdity. It would prevent either of them from being effective, and that is brought before Your Honors.

Now sometimes there is the difficulty as to what is necessary to be shown in an action for injunction. We have that every day. We think that there is plenty here, but we will pass that. But when it comes to the fact that both the Congress of the United States and the Legislature of California have provided for the determination of controversies that arise, why, you have an entirely different subject.

You have here a controversy between these parties. A controversy is nothing, Your Honors, but a claim on one side to one thing and a claim on the other side to another thing. If I claim that I have a certain right, a riparian right to land or water, and the other man comes in and [fol. 378] says I haven't got any such right, that it doesn't exist, that I don't own the land, there is your controversy. You don't have to have anybody use an axe or a shotgun or anything of that kind, although that might come in in some way or other for some purpose so as to make it clear that you had denied the right.

But if the thing is denied and the parties are on opposite sides of that controversy, there is your controversy.

Now why shouldn't this be decided? It has got to be decided somewhere. Here we come into court, and what do we have? Why, we have the statutes of Congress saying that this Court has got jurisdiction to give us the relief that we ask, that it has got jurisdiction because there is involved a statute under which we claim one thing and somebody else claims another thing under the same statute. There is a conflict. There is a dispute.

And, of course, Your Honors know what would be the result if this company is faced with two alternatives, as to whether it will obey an order of one of these bodies or the other.

In this very opinion, Your Honors, which counsel read, written by the Commission, I suppose—probably written

—I don't know, but written maybe by Judge McKeage himself—undoubtedly when a formal decision of the Commission is rendered it is pretty well safe to say that he [fol. 379] had a finger in the pie, naturally when they go out on a limb like that. What do they say in that opinion? Why, they said in that opinion that the Chairman of the Board of the Civil Aeronautics Board had insisted that a certain rate be put in force, and he insisted to that to the United Air Lines. They said that the United Air Lines considered that a demand that they put them in force, and so they put the rates in force.

And for doing that, that which it was forced to do, the Commission puts a penalty on them in the nature of a recovery of the whole fare that was paid or the difference between the fare that was paid and which should have been paid during that period.

Now I say we come in and we ask the Court to tell us who is our superior, who shall we obey, who shall we disregard. Now we can't answer that. The attorneys for the Commission can't answer it. All they can do and all I can do, is give my best judgment on what the law is. But the Court can decide it. The Court is here to decide it.

And it needs decision. There can't be any question, it needs decision. Even if they should get out of this case in some way or tie this case up further, and, of course, this case has been in this Court for a year or more, something like that, and we have done everything that was [fol. 380] thinkable to try to help the Court to find out what the law applicable to it is, and now it is suggested that the Court don't exercise its jurisdiction. Well, Congress never intended to give courts jurisdiction and then say they didn't need to exercise it. They have just got as much duty to exercise a jurisdiction that they have as they have to refuse to exercise a jurisdiction that they haven't got.

But here the thing that is to be decided, what we are talking about, what we are interested in, is who is the body that should establish these rates and make them enforceable and binding upon the parties. And who but the Court can do that?

And the Commission comes in here in this case and says, "Well, we drew an answer, and we come in now and say we don't intend to do anything with regard to penalties."

Well, Your Honors, I am not adverse to Your Honors' effort to do something maybe a little unusual or anything of that kind. I believe that judicial cases have a certain technique and at times you have to do certain things that it is reasonable to do to accomplish a reasonable result. Now what would be more reasonable than this Court, this Court that has been indoctrinated by the parties on a motion to dismiss, long arguments, long briefs, and we think without referring to our own that they are able, that they [fol. 381] give practically, as far as I know, everything that is available, and Your Honors have heard all that, and now they come in here and say, "Well, if we say we won't do a certain thing, why, Your Honors, you ought to throw them out, get them out of court." Of course that wouldn't bind anybody else at all. There still would be no decision as to the question that is bothering everybody.

And it doesn't make a bit of difference to us. I don't know that one of these bodies is any better than the other, or any worse, or anything else. They are all presumably honorable people who are trying to do their duty, and as far as I know they both are.

But without a knowledge as to whom we are to look to, why, the whole industry is stymied.

And what do they say? They say they won't impose penalties until they brought a proceeding—which would be entirely in their hands—and until that proceeding was decided they wouldn't impose any penalties that accrued prior to the final, effective decision.

Well, if Your Honors please, when men come in and say the Legislature has passed certain laws according to our ideas that imposed these penalties, and we say that we are not going to enforce them, and the Court is asked to carry out and help in that total disregard of the law, anything except to decide and get decided the issue that is here praying and crying for a solution. We didn't come [fol. 382] into this court just because we like to be heard and like to litigate; any idea of that kind would be absurd.

We come in here because we don't know which way to turn in regard to this route. One body comes and says: Put this rate in force, it is an honest rate, it is a good rate, it is a fair rate, it is lower, they said, than any other rate in the United States, and it is all right, you put it in force. We put it in force, and what is our liability under the law? —$730,000 a year in penalties. That is what it is, $730,000 per year, which is no mean sum. And for Your Honors to tell us, tell these people that are trying to run this air line, trying to be law-abiding in every way, they have done nothing that is wrong in any way, shape or manner, except that they might make a mistake—anybody can make a mistake—but they come here and the Court says, "Well, they say now that they are not going to prosecute these penalties."

I say, Your Honor, that that just wipes out, absolutely wipes out the statute that gives you the right to come into court to have a controversy, a difference settled, by judicial decision, and we are entitled to that.

This Court is given jurisdiction, and there has been no ground that I know of to the contrary. Suppose they said they were going to impose penalties. Then Your Honors would say, well, all right, we will go on and decide it. But that isn't the only basis of what they say. They [fol. 383] have said to us that we have a right to regulate this route and fix the fares. If they have, it doesn't make any difference what they say; they haven't the right to impose penalties if any have been imposed on this type of company, because we say there has never been any imposed on this type of company. But they say it has.

I submit, Your Honors, while you have heard this case, we have dug up the evidence, we have brought the highest type of men in our organization before Your Honors, we have brought Your Honors all the evidence that could be thought of in the case, and it is ready for decision, and we are asking Your Honors to decide it and to decide it on its merits, because the Congress which gave us the right to ask for declaratory relief says that is Your Honors' duty. The statute of Congress that said that this Court had jurisdiction where claims were made under an act to regulate commerce, it intended that that jurisdiction would be exer-

cised, and we submit, Your Honors, it should be exercised and this matter disposed of.

Judge Goodman: Mr. Treadwell, don't you think there is some difference between claiming a right and asserting it?

Mr. Treadwell: There is a difference.

Judge Goodman: That the State of California might say that they claim the right to regulate, but if they never [fol. 384] have taken any steps to assert that right, has any controversy arisen?

Mr. Treadwell: I don't believe whittling down a beneficial statute, such as the statute with regard to the right to have declaratory relief, by a lot of language——

Judge Goodman: Suppose the Public Utilities Commission never does take any further steps in this matter in respect to——

Mr. Treadwell: I am taking the case as it is, and there is no use of my arguing something that isn't here. The thing is here that they have gone to work and had their high officials write to us telling us that they have this right and that they are asserting it. If Your Honor would read those letters——

Judge Goodman: I have read that letter. But here in court, though, they said they were not now asserting that right.

Mr. Treadwell: Well, they don't say they don't assert it, Your Honor. They say they won't assert it until they have a hearing. That's the farthest that they go.

But what difference does that make, if we have an action, a cause of action because there is a difference between us? That's a controversy. Your Honors can look up the laws as well as I can on the question of controversy and it is just the broadest proposition that there is, and the courts [fol. 385] have always given it the very broadest kind of an interpretation, and I say that it does not mean that you have to go out and forcibly get into a fight or anything of that kind. No, nothing of that kind.

The difference between a claim and an assertion—I can't see anything——

Judge Goodman: The difference is when you seek equity, you seek to enjoin in advance, to show some other basis for asking that relief, such as irreparable damage.

Mr. Treadwell: You don't need that.

Judge Goodman: There is no question about the right to have a controversy determined. But the only question is it shouldn't be determined in advance at this time. That is all.

Mr. Treadwell: It is always in advance.

Judge Goodman: Provided that you are able to show there is a damage of some irreparable nature that requires the Court to act in advance rather than to wait to resolve it at the time of the controversy.

Mr. Treadwell: You mean to tell me that if two people live along side by side and one of them claims that he owns something and the other one claims that he doesn't, that you have got to wait around and see if they don't get into a fight and make a greater commotion or something? Of course, it's in advance.

[fol. 386] Judge Orr: Does your statement correctly present the picture? You say that two neighbors, one claiming one thing, another another. Then you resolve that dispute. But if you say, "I own some land—" taking your example—"I own some land. Joe Doaks says, 'well, I don't know whether I have any interest in that or not.'"

Mr. Treadwell: That isn't this case.

Judge Orr: John Doe says, I am going to investigate and see.

Mr. Treadwell: That isn't this case. That isn't this case. We have their direct statement that they have this right.

Judge Orr: Not before this Court.

Mr. Treadwell: Why not? In all those letters they said that they had the right.

Judge Orr: Concerning the right, why, that is a different thing. As I get this picture, this way, that you say they are a commission. They are asserting a right. They say, no, we are not asserting, right now, that we have got to wait and see, if we have a right here, and if we find out after investigation that we have, why, we will assert it. So you say, we have got a controversy here, that these people may in the future assert this right, that you are going

to head them off, and find out from this Court now and have this Court tell you whether they have a right or not before [fol. 387] they assert it. That's the picture as we get it,—as I get it rather.

If the evidence is such that—disregarding the attitude which they now take—if it was such that they say, we have a right and are asserting it. Then there is cause for intervention. But the mere expectancy that somebody may assert a right is what bothers me.

Mr. Treadwell: I am not claiming anything of that kind.

Judge Orr: I know you are not claiming it. But isn't that the case? That is what we are confronted with. Isn't that the case before us?

Mr. Treadwell: No, Your Honor. The case before you is that the Commission, speaking to us, has told us in no doubtful terms that they have this right and that it is our duty to obey what they say in regard to these rates.

Now, it isn't just something that we have worked up. It comes from them. I don't care whether you call that an assertion or a claim or what you call it. It is a claim that they make and it is an assertion that they make, and you don't have to distinguish them because it is both. You asked me what the distinction between an assertion and a claim is. Well, I don't know whether there is any.

Judge Orr: I am asking you by what is this Court to be guided, the former position which they have asserted in a letter, or a position taken at this time of trial?

[fol. 388] Mr. Treadwell: They have taken it right here. Judge McKeage, the last thing he said on the stand, he claims that they have that right, that he has advised them as a lawyer that they have the right, and that if they call another convention or meeting or conference to find out, that he will advise them again that they have that right.

Judge Orr: When they hold their meeting and if he so advises it, they will then assert that right.

Mr. Treadwell: Well, they have asserted it.

Judge Orr: And not until that time will the right be asserted.

Mr. Treadwell: Of course, Your Honor asked me to give my views on that and I stated it is asserted and claimed.

Judge Orr: I am very glad to get your views. I want to see if you can straighten me out.

Mr. Treadwell: That is what I am trying to do. I am not trying to be smart or outsmart Your Honor or anything of the kind.

Judge Orr: When I say I want you to straighten me out, maybe you think that's a pretty hard task. I would like to have you try.

Mr. Treadwell: Our idea of the case is a very simple one, Your Honor. I don't say that my case is just something different from anybody elses. But I say that generally when there is disputes between the parties spoken, announced in [fol. 389] the most formal manner, incorporated in opinions which are published by the State, printed, and they come out and they make these contentions, I say that that is quite sufficient to make a controversy where you dispute everything that they say.

Judge Goodman: It may be, Mr. Treadwell, that none of us have made ourselves quite clear. We have already ruled that you stated a cause of action.

Mr. Treadwell: I think Your Honors have.

Judge Goodman: Now the only question is, is this the time to grant the equitable relief that you ask for? Now, that is all.

Mr. Treadwell: Suppose it wasn't. We are asking relief —the relief that we are asking, that you call equitable relief, is to determine whether we have this right or whether we don't have it, and whether they have the right they claim or whether they don't have it. Now if you decide that, I don't care whether you give me an injunction or not. I think I am entitled to it. But Your Honors have a simple question of deciding this issue and this controversy.

Judge Goodman: Well, the only way we can decide it, that is, either to grant an injunction or give declaratory relief——

Mr. Treadwell: Sure.

[fol. 390] Judge Goodman: —of some kind, which would be equivalent to the prevention of any further act on the part of the defendant in the future.

Mr. Treadwell: Quiet title suit is the most common instance of declaratory relief. You simply declare that one

man owns it and the other man does not own it. That's all there is to it.

Judge Orr: I think we can get to the other proposition. Now, if we were firmly convinced, as you are, that the controversy now exists, then in that situation that would clarify itself. But you rely upon the letters asserting a certain position.

Mr. Treadwell: That's right.

Judge Orr: On the other hand, suppose that isn't an established fact, the question of whether they assert that position is yet to be determined by the Commission.

Mr. Treadwell: They didn't say so in those letters.

Judge Orr: Oh, no?

Mr. Treadwell: They said they did assert them.

Judge Orr: Now, which position are we to take, they come here and say they have not made a determination, this Commission has not made a determination as to whether they will assert those rights and until they do then the controversy does not exist, does it?

Mr. Treadwell: I think that it exists as soon as a body [fol. 391] of that kind makes a declaration of what its position is.

Judge Orr: I suppose that you are saying that if at the time you got those letters you were in a position to say that they had taken this other position, that they were going to assert those rights, by reason of those letters, then, you very properly would come into this Court and ask for a determination of whether they had the right to do that.

Mr. Treadwell: Yes.

Judge Orr: What is bothering me a little bit now is what effect should this Court give to this change of position, if it is a change of position? Mr. Phelps does not think it is. But it seems to me that there is a change of position to that extent, that in the letters they say: we have these rights. Now they say: we haven't determined as a matter of Commission action. We are going to investigate to see whether we do or do not have these rights.

Judge Goodman: They might even take the position relying upon Judge McKeage's opinion, that they believe that they have the right to assert jurisdiction, but deter-

mine not to assert jurisdiction over you for other reasons. And may be some other reasons that might urge them to say that even though they feel they are in a position to assert jurisdiction over your air line, that they are not going to do it now. If they didn't do it, you wouldn't have any cause of action against them.

[fol. 392] Mr. Treadwell: We have a cause of action on account of the threat which clouds the whole issue.

Judge Goodman: Unless it causes you some damage, it is no more than a threat of a man who says he would like to do away with the judge. If he doesn't do anything about it—except that you might put him under bond and keep the peace or something like that—it still isn't an actionable cause of action.

Mr. Treadwell: I can't answer that, Your Honor.

Judge Orr: You never expressed an opinion of that kind?

Mr. Treadwell: I have never expressed such an opinion.

Judge Orr: I won't say whether you had it or not.

Mr. Treadwell: Of course, Your Honor, I don't think there is any room for——

Jude Orr: I think we have our position pretty well, Mr. Treadwell. We will have to work it our for ourselves.

ARGUMENT BY MR. OZMENT FOR INTERVENOR

Mr. Ozment: I have already covered the question of our position with reference to the mere institution of the proceedings before the Commission being sufficient to warrant intervention of the Court at this time. I would like to elaborate.

Judge Orr: We would like to have you tell us a little more about those cases you have.

Mr. Ozment: Yes, Your Honor. The first case is the [fol. 393] Bryce against Santa Fe Elevator Company. It was a warehouse case. The Commission of Illinois had some sort of jurisdiction to regulate warehouses. I am not just sure how far their jurisdiction extended. The court ultimately decided as to some of the matters complained against the State, the Commission had jurisdiction and as to others it did not have. But the complaint was filed by a competitor, as I recall, against the Santa Fe Elevator

Company, and the company thereupon moved to dismiss the complaint for lack of jurisdiction. The Commission denied the motion to dismiss and said the case stands for hearing.

Now it does not appear from the Supreme Court opinion whether in doing that that the Commission asserted jurisdiction and said, we will go ahead and act in this matter, or whether it was the traditional simple denial with the whole question of jurisdiction open at the hearing before the Commission. I suspect it was the latter.

Judge Goodman: What was the posture of the case? That is the important matter. Was this appealed to the Supreme Court from a decision refusing to dismiss the complaint?

Mr. Ozment: No. After the Illinois Commission refused to dismiss the complaint—in other words, assuming the California Commission had refused to dismiss the complaint, the party against whom the complaint was directed before the Commission immediately moved into the Federal Courts for we'll say, seeking declaratory and in- [fol. 394] junctive relief, just as these plaintiffs have done. The only difference between the two cases is that here we have a letter order, so to speak. We have a letter demand. There we had a formal order entered by the Commission. The Federal Court took jurisdiction, decided the issues, and then an appeal went to the Supreme Court, and the Supreme Court passed on the validity of the District Court's determination.

Judge Goodman: There was a formal decision of the Commission there which gave its asserted jurisdiction?

Mr. Ozment: I am not sure, Your Honor, whether there was anything more than a bare order denying the motion to dismiss.

Now, as Your Honors know, the habitual order, regulatory order, in these Commissions is not to determine your jurisdiction. You say: We just deny the motion to dismiss at this time; we will determine the jurisdiction at the time we hear the merits. That is the customary procedure, and I assume that is what the Illinois Commission did.

But, in any event, the Federal Courts stopped the Illinois Commission in its tracks, to use the bureaucratic language,

they stopped them. They said: You shall proceed no further.

Judge Goodman: It was a proceeding before the Commission?

Mr. Ozment: There was a formal proceeding, yes, Your [fol. 395] Honor. There was a formal proceeding.

In the Bethlehem case there had been a subpoena issued, subpoena duces tecum and the Federal courts intervened on a state order affirming or directing compliance with the subpoena.

In the United case, which is the closest case factually I think to this particular case, there the Commission had entered two orders, as I recall, one more or less asserting jurisdiction, the other directing the company to appear and defend before the State commission, and it ultimately thereupon went into the Federal court. They alleged, as in this case is alleged, irreparable injury, and the Public Utility Commission of Ohio, even as this Commission, flatly denied all of the allegations. They said in substance there had been no untoward circumstance which will result to you if you fail to abide by our order. And the Supreme Court commented on that. They pointed out that the Commission had denied all of these allegations of irreparable injury and threats and enforcement and the like, but they went on to say that the parties had stipulated that it would cost the plaintiffs a substantial sum of money, in excess of $3,000, to comply with the order to appear and defend. Now that is the case that we have here, I submit.

Mr. Treadwell testified that it will cost more than $3,000 to defend the action before the Commission. I think that [fol. 396] certainly it would cost at least $3,000. I think there is no doubt as to that. And here they deny any threats of reprisals. The case is identical, it seems to me, to this Supreme Court case.

There is a crying need for relief. The company is going to be put to expenditures.

Judge Goodman: You say specifically that the matter Mr. Treadwell referred to is equivalent to the factual situation or is comparable to the factual situation in these three cases where the Commission itself took some action?

Mr. Ozment: Yes, Your Honor.

Judge Goodman: In one case they ordered the utility to appear and produce evidence, and in another case they directed the subpoena duces tecum issue, and in the third case they made an order dismissing the complaint. Now what you are saying is that this letter is equivalent to that.

Judge Murphy: In other words, in each of these three cases, which you mentioned formal orders were issued by the Commission.

Mr. Ozment: There were formal orders, Your Honor, yes. Now if I——

Judge Murphy: That isn't the situation here.

Mr. Ozment: If I may comment briefly on that. First of all, the Court is aware an order of the regulatory agency, to be a reviewable order, does not have to be a [fol. 397] reviewable order, does not have to be a formal order with a serial number reciting on its face that it is an order. Letters can be reviewable as orders, and they are on occasion reviewed as orders. There are circuit court decisions holding that where the commission addressed a letter to the individual telling him to do what they told him, could just as well by a formal order, that he can seek review of that determination.

I direct the Courts' attention to the fact that these orders or these letters from the Commission do not purport to emanate from an official of the Commission. They purport to emanate from the Commission itself. They are signed by the Secretary. Now the only way a Commission can act is, of course, through its secretary. Our orders are attested by our secretary. That is just the equivalent in this case.

There was one point that I would like to mention briefly. I thought I detected from what the Court or some of the Judges were saying that there might be a possibility that United in this case would not actually be put to any expenses because they did not have to appear and defend.

In other words, that the United can sit by and say to the PUC of California: Go ahead and hold your proceedings and we aren't going to show up; that whenever you come out of that, why, with whatever you arrive at, then [fol. 398] we will appear and defend.

I submit that United cannot safely follow any such course of action. It is one thing to come in and say: We don't have to go through a proceeding before the agency. It is another thing when the Court says, if the Court should dismiss, you must seek a determination first from the PUC. It is quite a different thing for United not then to appear and defend, and I very strongly suspect that under those circumstances that the Public Utilities Commission could invoke and successfully invoke against United the rule that they simply had not appeared and defended, that it was more or less a default sort of proposition, and I just think that United cannot do anything but appear before the State Commission. I know that is the position which we would take in our litigation. If somebody fails to appear before us, our statute says that you shall not urge objection before a court which is not urged before the agency. That is a firm command to appear and defend. If you don't, you are out of luck.

Judge Goodman: Wouldn't it be time enough for this Court to intervene when such proceedings start?

Mr. Ozment: That raises the question of distinction between a formal order of investigation and simply an announced contention of instituting such investigation.

Judge Orr: I find something here that I didn't get be- [fol. 399] fore. It may have some significance.

> "This is to inform you that the Commission does have jurisdiction over the service in question, being intrastate, and the Supreme Court of this State has held that such service is subject to the jurisdiction of this Commission. Therefore you are instructed to file with this Commission the tariffs covering the service in question."

Now, that may be construed as an order.

Mr. Ozment: That is my point, that an order does not have to necessarily be one with a serial number and with all of the—with the seal on it. That a letter directive is an order. And here is an order.

Now there are two possibilities, two ways, which this matter can be reviewed. One, that this is already such an order to be followed—at least an order directive to file.

The other, that the Commission has yet not instituted or entered such an order. But we cite a case in our memorandum, Supreme Court case, which takes cognizance of the fact that there was an opinion that the Commission in that case had not yet entered a formal order and the Supreme Court says that it makes no difference, they certainly intended to do it and that is enough, you don't have to wait until they actually issue a piece of paper, you can go on it and get your relief.

Now it seems to us that under these circumstances that [fol. 400] the Court has jurisdiction and it is under a duty to decide the case at this time.

Now what I have been saying so far has related to the United's case. Now I would like to talk very briefly about the Board's case. The Board is a full party to this case, as we understand it. We are a plaintiff. We have filed a complaint and that complaint has been answered. The Board has standing, even as any other litigant, to seek a determination of the merits of this case. We have cited the cases in our memorandum previously filed with the Court to that effect.

The Board alleges that, among other things, the PUC had asserted jurisdiction and that it intended to exercise that jurisdiction in the form at least of a proceeding before it.

The answer which the PUC filed said: Yes, we assert jurisdiction, and yes, in substance, we are going to institute a proceeding before ourselves.

Now it seems to me that irrespective of whether United established their case or not, we have established our case, and as a matter of law we think we are entitled to a determination.

Judge Orr asked the question: What is the posture of the case, what are the defendants arguing today? Well, the defendants are asserting today, through their answer to our complaint, right as of this moment they claim jurisdiction and they are going to exercise jurisdiction. [fol. 401] Judge McKeage didn't say anything very different in my way of thinking. He said, yes, I told them before they have jurisdiction and I will tell them again

they have jurisdiction, if there is no change in circumstances.

Now I can't conceive of any possible change in the circumstances. The only possibility is that perhaps there will be some legislation which might be passed affecting this title and situation. It is inconceivable to me that they would ever pass legislation extending the California jurisdiction clear out across San Pedro Channel. But that is the only possibility that I can see that would make any change at all in the circumstances, and that is just so remote and so speculative that I just don't think that it is a fact to be considered.

We stand before the Court with pleadings and with testimony which we think entitles us to some form of relief and we are not concerned as to whether that takes the form of declaratory order or whether it takes the form of injunctive relief.

Now one last word and I will be through, and that has to do with this question of whether the Commission may follow through with what they previously announced that they intend to do. I think that that is a possibility which is always present in any law suit. You just simply could not get an injunction if you said, well, we will not issue an [fol. 402] injunction or we will not give declaratory relief because the parties may change their mind. Sure, they may change their mind. They habitually do. Cases are settled right up to the time of argument. But that does not make it any the less a valid case for decision in the absence of a change of mind.

And, of course, we have here a Commission which is under a duty to exercise its jurisdiction. We presume that they will exercise that jurisdiction, which they assume that they have. They will be remiss in their duty if they didn't and certainly nothing was said today that would indicate that they didn't intend to go right ahead with this action.

And that, and that alone, we maintain, is enough to warrant and require the Court to take jurisdiction.

Mr. Phelps: May it please the Court, may I inquire how much time I have?

Judge Orr: How much time?

Mr. Phelps: Yes.

Judge Orr: We haven't been observing that. If you go too long we might suggest to you that you have about five minutes to finish. You can go on to that point.

ARGUMENT BY MR. PHELPS FOR DEFENDANTS

Mr. Phelps: First I should like to comment, if I may, upon the question as to whether or not there is any threat or any reality to any threat of any irreparable injury to these parties in the event this Court should decline the [fol. 403] relief requested. Out of deference to the Court's suggestion I did not introduce here all of the evidence which I had originally planned to introduce here this morning on the question of just what has occurred between the parties here on the question of the utterance or expression of threats as to the Commission's intentions.

I am going to assume then for the present, if Your Honors please, that the Court will find and believe that the Commission now has and I trust will find also that the Commission never had any intention with respect to this Catalina operation other than as expressed by Judge McKeage, to institute an investigation, allow whatever order comes out of that to become a final order, and await the determination of that, and determine if it should be adverse to this plaintiff.

Judge Orr: How do you reconcile—you say "never has". How do you reconcile that language in this letter?

Mr. Phelps: My view of the letter, Your Honor, is this, it is an expression of the opinion of the Commission, if you will, conveyed through its secretary, that it had jurisdiction in the circumstances.

Judge Orr: And ordering affirmative action on the part of the defendant. Not only an expression that it has jurisdiction but an exercise of jurisdiction. It did intend an exercise of jurisdiction by ordering the air lines to file [fol. 404] the rates.

Mr. Phelps: It is true, Your Honor, the concluding——

Judge Murphy: The concluding sentence——

Mr. Phelps: The concluding sentence of the last letter is:

"You are instructed to file the tariffs."

That is true. That follows from its expression of opinion that it has jurisdiction, it being the Commission's position that if we have jurisdiction, as we say we do, it follows from that that you must file your tariffs. But it does not follow from that expression of opinion that the Commission thereupon is going to commence penalty actions against these people if they do not file that tariff. On the contrary, the intention has always been and is wholly consistent with those letters that first of all a formal investigation would be instituted and the parties heard fully and that that order would have to become final before any penalties would be instituted.

Judge Murphy: Well, isn't the plain tenure of that letter to put them on notice that they would be expected to file with the Commission the tariffs requested?

Mr. Phelps: Yes, it is, Your Honor.

Judge Orr: And that the investigation must have been previously had and that they have reached a conclusion. They have reached the conclusion, now, they have the jur-
[fol. 405] isdiction and now they are going to exercise it?

Mr. Phelps: Your Honor, let me explain, if I may, how the Commission functions. There are formal, so-called formal proceedings before the Commission, many of which are proceedings that resemble very closely proceedings had before this Court this morning. They are set down for hearsing with notice, of course, to all the parties. The evidence is usually heard before an examiner, and ultimately the Commission arrives at a formal decision and announces that and serves it, of course, upon the parties. That becomes then the point of departure for any appeal or review which a party seeks to enjoy. It has never been the though- of this Commission that a letter, the kind referred to there, in itself was a reflection or an embodiment of the Commission's expression of its jurisdiction. That is an opinion, as I say, as to what the Commission said, although we do not say it is not the Commission's informal opinion, if you will, but it is always contemplated in our experience, in our practice, that there would be a formal hearing before the Commission's formal position, which would be subject to review, would be expressed.

Judge Orr: I don't know what the general review is. I know if I were in the position of the air lines and got a letter like that, I would commence to do something. I think I would better do something right away, either send [fol. 406] the tariffs or tell them the circumstances.

That seems to me like an order, a direct order, and what may be back of it, I think I am logical in saying that that does not convey to the party—no matter what their intention may have been, that letter does not convey that impression to the person receiving it. It means that the party receiving it, you better comply with this, you do this thing—that's it. And I received it, I would feel I better do that or take some other action to challenge their jurisdiction or do something else, because otherwise I might get into very serious trouble.

Mr. Phelps: Well, if Your Honor please, if I may say so, it does not seem to me that that letter fairly construed can be interpreted as conveying to these parties that they were in danger of being made defendants in a penalty action, penalty actions or criminal prosecutions.

Judge Murphy: There is a subsequent letter which seems to give point to the previous letter to which Judge Orr has referred, in which the last paragraph reads:

"This refers to our exchange of letters" and so forth. The first paragraph, the second paragraph, which consists of one sentence, says;

> "Can you now inform us what position you propose taking in this matter?"

In other words, you are again putting them on notice. [fol. 407] Mr. Phelps: Yes. It was again, Your Honor, it was the hope that was entertained, that the United Air Lines would have no objection to the Commission's exercise of jurisdiction over this Catalina flight, it being a short flight, it being in our view, within California. It was hoped that the United Air Lines would submit to the Commission's jurisdiction on that flight.

It was not meant to say, however, that if you do not so submit we will immediately commence penalty actions and criminal prosecutions against you. That has never been the intention, and I submit, Your Honors, those letters do

not fairly admit of that interpretation. It was an expression of opinion as to what the Commission's thought jurisdiction was, coupled with the—to file tariffs, which follow an expression of opinion coupled with the hope that the company would comply, but contemplating all the while there would be formal proceedings with full opportunity to be heard in argument, submission of briefs, and otherwise, before that decision becoming final, with all review exhausted before any penalty suits would be instituted.

Judge Orr: How do you usually operate? The Commission, how does it usually operate?

Mr. Phelps: The example we have had before us this morning, rather one that has been referred, the decision has already been rendered, is a good example of how the [fol. 408] Commission functions. There the first step was the institution of an investigation on the Commission's own motion. United Air Lines was one of several respondents there. The case was fully heard, fully tried, fully heard and argued, review was completely exhausted, and then the Commission implemented or sought to implement its order to the parties to make reparation and also then, but not until then, filed its penalty action.

That is the way the Commission functions.

Judge Murphy: Well, I can't reconcile your argument, the argument that you are making now, with your letter of December the 27th, 1951, the last paragraph of which says:

> "In view of our interpretation of the Civil Aeronautics Act and the California Constitution, we again instruct your client, United Air Lines, Inc., to file with this Commission the tariffs covering the service between Avalon and Long Beach, Los Angeles."

Now if that isn't a definite order, I don't know what is.

"We again instruct your client"——

Judge Orr: That is the second time?

Judge Murphy: That is the second time.

Mr. Phelps: Yes. Well, as I say, it was couched in terms of an order, to be sure, but in terms of an order that the Commission felt followed naturally from its expression

[fol. 409] of its opinion as to its jurisdiction. But it does not seem to follow that there is an implied threat there that if you don't do it you will be subject to penalty actions.

Judge Murphy: Any reasonable man reading a letter of that kind would certainly interpret it.

Do you stand now in court on that instruction in that letter or do you withdraw that now in court and say: we withdraw the instruction and order that we issued you to file schedules?

Mr. Phelps: Well, I have no——

Judge Goodman: I suppose you have no authority to answer that, but nevertheless that is a very pertinent question. Isn't it?

Mr. Phelps: Well, Your Honor, it seems to me that the stipulation or the offer to stipulate and the statement of position and intention which Judge McKeage has expressed has the same effect.

Judge Goodman: Well, would you add to that stipulation, the stipulation that the Commission withdraws and does no longer instruct the air lines to file these schedules?

Mr. Phelps: Well, if I may confer with the Judge for a moment, I think perhaps we can answer your Honor more directly on that.

Judge Goodman: If you do that, then that would be a definite statement here in open court that you are not [fol. 410] asserting jurisdiction, at least to the extent of requiring schedules to be filed.

Mr. Oxment: If Your Honors please, if I may make a statement on that point. I don't know what Judge McKeage's authority may be. I know that one member of the administrative agency cannot bind the agency, and certainly a lesser official of the agency cannot bind the agency.

I think that this order, letter, whatever you call it, is in the record, and it would take formal action on the part of the commission to make it appear to be—or to withdraw from that letter, and I must object at this point to counsel indicating, "well, we didn't mean what we said." I think that they did mean what they said, and I question counsel's rights to withdraw Commission action.

Judge Goodman: Wouldn't they have the same right to make the stipulation in that regard as wherein they had signed a stipulation of facts? The attorney is representing the Commission.

Mr. Ozment: No, Your Honor, the things are entirely different. They are entirely different. One purports to be formal action by the agency. The other is simply authority to represent their client in a lawsuit. And I had assumed moreover that in connection with that stipulation, that that stipulation would have more teeth in it than just counsel's say-so. I would assume that the moment that they took any contrary action that there would then be [fol. 411] contempt proceedings before this Court, and that there would be action in a hurry if at that time some untoward action should be taken,—at least it would be another injunction issue. I would assume that would be so. Certainly we couldn't be stipulated out of Court without some remedy in the event that the stipulation was not thorough.

Mr. Phelps: I would like to try to make clear, if I can, the fact that under the Commission's practice as guided by the California Public Utilities Act a mere letter of the Commission, such as we have here, cannot be made or cannot be turned into a foundation for contempt or penalty actions or anything of this sort. The law requires that before a utility or a party be made the subject of Commission action that he have a hearing. Now there was no hearing here. There is no one, and no one has pretended that there was a hearing before the Commission as such in this matter, and the letters there never became or never intended to be of such a nature as to give or serve as a basis for implementation in the form of contempt or otherwise.

Judge Murphy: That is not very convincing, is it, counsel? When this case started in this Court it was on the theory that there had been a definite assertion of jurisdiction by the Commission and what caused the Court to pause in this matter was some statements were made that would indicate that the Commission had no present inten- [fol. 412] tion of pursuing the matter and that therefore there wasn't anything that required any immediate equi-

table action by this Court. Now, if you are really going to assert this jurisdiction and you are doing so and there is quibbling in connection with the terms of it, there it seems to me that I for one am willing to assume the position that there is something for the Court to determine here in this case.

This all came about because of some inquiries the Court directed, and the defendants' answer apparently indicated that they weren't going to do anything, that they hadn't asserted jurisdiction and for the time being they weren't going to.

Mr. Phelps: Let's be sure, Your Honor, that we understand one another as to what is intended to be conveyed by the word "assert" jurisdiction. The expression of an opinion, I think we can say, is not yet an assertion of jurisdiction. If that expression of an opinion is coupled with a direction to file a tariff, again you can say it is an assertion of jurisdiction in the sense that it directs the party to comply with the Commission's version of what it thinks its jurisdiction is.

But if you say that asserting jurisdiction means doing something that will harm the plaintiff, such as bringing penalty actions, or criminal prosecutions, then I say that [fol. 413] in that sense of the word "assert" the Commission has never asserted such jurisdiction.

Judge Orr: And not intended to. That is not what we are confronted with here, it seems to me. I think that it is reasonably said that the air line company has a right to assume from those letters that were read that this Commission had ordered them to file tariffs and certainly they couldn't order them to do that unless they were asserting jurisdiction and thought they had jurisdiction. They couldn't safely stand by after that order was made and wait for any subsequent action of the Commission.

Mr. Phelps: I think they could.

Judge Orr: Because the Commission, if it brought an action for penalties, would have to base it upon a disobedience of this order which they had informally made. So if they stood by after that order there contained in this letter,

they would be running the risk of the penalties for wilful disregard of an order of that Commission.

Mr. Phelps: Now with that, Your Honor, I cannot agree.

Judge Orr: Perhaps not. But looking at the plain wording of those letters, I cannot get any other conclusion from them.

Mr. Phelps: I say, Your Honor, I respectfully must disagree, because——

Judge Orr: Well, you have that right, you know.

[fol. 414] Mr. Phelps: Yes. The letter, I think, was not calculated and not intended to convey to the plaintiffs that they were in peopardy or were in eminent risk of being subject to pecuniary harm or otherwise if they didn't comply with that instruction.

Judge Orr: I suppose that you and I can agree upon the proposition that it will be the duty of this Court to place a construction upon that language as used in that letter?

Mr. Phelps: Yes.

Judge Murphy: This last letter of December 27, 1951 is a very well-thought-out letter. It contains a very concise analysis of the position taken by the Public Utilities Commission, and then it ends up with a final paragraph:

> "In view of our interpretation of the Civil Aeronautics Act and the California Constitution, we again instruct you,——"

after giving an analysis in some detail of the factual situation and the predicates upon which you based your conclusions.

If that isn't notice, I can't conceive of any more formal notice. "We again instruct you."

Mr. Phelps: I can only say, Your Honor, that that letter, I think, should be construed in the light of the Commission's practice. True, letters like that are not uncommon in the [fol. 415] Commission's practice, and it has never been the Commission's view that any such letter as that would give rise to penalty actions for contempt, because the law does not permit it. The law requires a hearing to any party concerned.

Judge Murphy: Where is there any advice to the air line company that they are entitled to a hearing?

Mr. Phelps: It is not conveyed in that letter, Your Honor, but it is in the Public Utilities Act, and I think it can be assume- that the parties would realize that they would have a right to a hearing. It seems to me that would be fundamental, that you would be entitled to be heard before you could be made the victim of a penalty action or contempt proceedings. These parties have not been heard formally or otherwise. Well, there is an exchange of correspondence, but——

Judge Orr: What would be the next step? Suppose nothing had been done by the air line company and they had disregarded the letter, what would be the next step of the Commission?

Mr. Phelps: A formal investigation.

Judge Orr: To determine what?

Mr. Phelps: To first ascertain the facts as to the operation and then to determine whether or not the Commission had jurisdiction over that operation.

[fol. 416] Judge Orr: If they had determined it had jurisdiction?

Mr. Phelps: That would be subject, of course, to review.

Judge Orr: And finally if it had been determined that they had jurisdiction——

Mr. Phelps: Yes.

Judge Orr: —by then a penalty action would have laid against these people for wilful disregard of that instruction?

Mr. Phelps: No.

Judge Orr: Why not?

Mr. Phelps: I don't think so.

Judge Orr: Why not?

Mr. Phelps: Because the Commission would not interpret that order. That letter as an order having been made without a hearing, it would not consider that, under the law, could not consider it, as something—as the kind of order made—that order made without a hearing, that could not be considered that that would be the subject of contempt or penalty actions. Any penalty actions, as I said before, would be considered only after final decision, only

after the parties had been given an opportunity to comply, if that had been the result.

Judge Orr: Why take such action as this before a hearing if they don't expect it to be obeyed?

Mr. Phelps: It was hoped that it would be obeyed, Your Honor, as I said before. It was hoped that the United Air [fol. 417] Lines and the other plaintiffs would have no objection to the Commission exercising jurisdiction. The Commission's jurisdiction over San Francisco-Los Angeles operation having been finally confirmed, it was hoped that the parties would have no objection to the Commission's jurisdiction over this flight.

Judge Murphy: So the form that this letter took then was in the hope that the necessity for a hearing might be obviated, is that correct?

Mr. Phelps: Yes, I think it was fully within the intention of that letter that if the parties complied, that would end the matter.

Judge Goodman: If they complied, then the Commission would have exercised its jurisdiction and regulated those rates.

Mr. Phelps: Yes.

Judge Orr: Of course.

Judge Goodman: Then, you are really not going to do anything in this hearing except what you have done before?

Mr. Phelps: I am not sure I understand you, Your Honor.

Judge Goodman: If that is the case, then I am wrong about my interpretation of what has been said here earlier this morning, that you are not initially going to do anything at the hearing except assert this establishment of rates of United Air Lines in the service to Catalina.

[fol. 418] Mr. Phelps: That is as far as the Commission intends to go at the present time. It is to be hoped that is as far as it will go.

Judge Murphy: Thereby you do intend to establish those rates at this hearing or at the initial course of this investigation?

Mr. Phelps: It is the intention to have the investigation.

Judge Murphy: With what purpose in mind?

Mr. Phelps: To determine whether or not the United Air Line should file a tariff with the Commission.

Judge Goodman: Is that really so or is this investigation going to be just a determination what the rates are going to be fixed? Are you going to conduct an investigation to determine whether the Commission has jurisdiction?

Mr. Phelps: Yes.

Judge Goodman: You have already told them to file their schedules.

Mr. Phelps: Indeed, yes. Yes, the jurisdictional question would have to be gone into at that time, at the time of this formal hearing.

Judge Murphy: As a practical matter, if you referred to your letter of December 27th, which I have seized upon here, there can be no other result than that you will again instruct the United Air Lines to file the tariffs covering [fol. 419] the service unless there is some radical departure from the position which you have taken in this letter.

Mr. Phelps: That is true.

Judge Murphy: There can be no other result.

Mr. Phelps: That is true, Your Honor. But then the parties would have a right to seek review of any such order, and, furthermore, there is the possibility that the Commission might be persuaded to change its mind. That is not inconceivable.

Judge Goodman: It is true the United Air Lines would have a legal remedy.

Mr. Phelps: Indeed.

Judge Goodman: But the question is whether or not they are entitled to this relief in order to avoid some irreparable injury that would culminate by having been compelled to follow that legal remedy.

Mr. Phelps: Yes.

Judge Orr: They have made an election. It seems to me that the air lines have made an election between remedies existing. They could have gone before the Commission and raised the question. They have now come into this court and said, here, we don't want to be put to that expense, and we claim they have no jurisdiction over us at all, and we ask you to so declare. Now that's the situation. Under

the circumstances perhaps had a right to make that election.

[fol. 420] Mr. Phelps: Now that brings me to the next major point I want to discuss, Your Honor. I had hoped that I had expressed myself fully to the effect that the parties here were under no risk of irreparable injury. Now I submit that that is the fact. Now the question is, should this Court in the absence of any danger of irreparable injury, should this court retain this complaint for the purpose of declaring judgment upon the parties. And that brings me to the case and a very important case, the case of Alabama Public Service Commission vs. the Southern Railway Company. I have already referred to that case on the previous occasion.

Judge Orr: Is that in the brief?

Mr. Phelps: That is in my formal brief, yes, Your Honor. That case was decided on May 21, 1951, and I believe I can say that it is the most recent expression of the United States Supreme Court on the question of what a federal court should do in a case in which it is asked to issue equitable relief which has the effect of interfering with the operation of state agencies or branches of state government.

Now in that case the Southern Railway had applied to the Public Service Commission of the State of Alabama requesting permission to discontinue certain local trains which they were operating at deficits and were a burden on interstate commerce. The Alabama Commission declined to authorize that discontinuance. The Alabama statutes had provisions for penalties applicable to rail-[fol. 421] roads and others in the event that they refused to or in the event that they abandoned the service without the permission of the Commission.

Mr. Treadwell: Would you excuse me, please. You argued all this on the motion to dismiss in this particular case, and it is also in our brief and the Court passed on it.

Mr. Phelps: I don't think——

Judge Goodman: It has been introduced.

Mr. Phelps: I wish to talk about this case in the light of the evidence that has made here.

The railroad company then filed a complaint in the Federal District Court in Alabama requesting injunctive relief against the enforcement of any penalty actions that might be exercised by the State of Alabama. The District Court granted such relief. On appeal to the United States Supreme Court the judgment of the District Court was reversed.

Now that, Your Honors, I submit, is a very far-reaching decision. It is the latest expression and I think can be called the culmination of a long series of cases involving what Justice Frankfurter has called the "doctrine of abstention." Justice Frankfurter in this Alabama case wrote an opinion, a separate opinion, concurring in the result but disagreeing with the majority as to the manner in which the result was reached, but his concurring opinion is most interesting and indicated the extent to which the majority opinion was going, and he points out that it is a very far-[fol. 422] reaching decision and presumably that is what the majority of the Court intended. I should like to read, if I may——

Judge Orr: I guess that case is rather familiar to us, having been cited before. Wasn't it? You cited it before?

Mr. Phelps: Yes.

Mr. Treadwell: Yes.

Mr. Phelps: I referred to it before.

Judge Murphy: I think we all read it.

Mr. Phelps: I beg your pardon?

Judge Murphy: I think we all read it.

Judge Goodman: It has a very strong concurring opinion in that case.

Mr. Phelps: Justice Frankfurter wrote a separate opinion, yes, Your Honor.

As Justice Frankfurter had said in another case prior to this Alabama case, and I refer to the case of Railroad Commission of Texas vs. the Pullman Company, 312 US 496, 85 Lawyers Edition 971, which I had not previously cited. In this Pullman case Justice Frankfurter——

Judge Orr: Let's get that again, please.

Mr. Phelps: 312 US 496, 85 Lawyers Edition 871.

I should like to read to you what Justice Frankfurter had

to say. I am quoting now from page 974 of the Lawyers [fol. 423] Edition and from page 500 of the U. S. Reports:

> "Few public interests have a higher claim upon the discretion of a Federal chancellor than the importance of needless friction with State policies, whether the policy relates to the enforcement of criminal law (and citing cases) or the administration of a specialized scheme for liquidating embarrassed business enterprises (citing case) or the final authority of a state court to interpret doubtful regulatory laws of the state. These cases reflect a doctrine of abstention appropriate to our Federal system where by the Federal courts exercising a wide discretion restrain their authority because of scrupulous regard for the rightful independence of the state governments and for the smooth working of the Federal judiciary (citing cases). This use of equitable powers is a contribution of the courts in furthering the harmonious relation between State and Federal authority without the need of rigorous Congressional restriction of those powers."

Now that, as I say, that case, and the Alabama case, which is the most recent one, carries the doctrine further as Mr. Justice Frankfurter indicates than had previously, that it had ever previously been carried. Nothing, I think, turns upon the fact that in the Alabama case there was no re- [fol. 424] quest for declaratory relief. I think it is conceded that declaratory relief is a form of equitable relief.

Judge Goodman: The Alabama case, though, did not turn upon the assertion of a conflict of jurisdiction between the commissions. In the Alabama case, I think, the Federal court interfered on a constitutional ground, didn't it?

Mr. Phelps: The lower district court in the Alabama case had acted upon the ground——

Judge Goodman: On constitutional grounds.

Mr. Phelps: In a sense I suppose you could call it constitutional. The immediate ground being that these train runs were a—the continued operation of them was a burden on the interstate commerce.

Judge Goodman: Taking property without due process—the general constitutional grounds?

Mr. Phelps: Yes.

Judge Goodman: Justice Frankfurter's opinion was in line with many decisions which urged the Federal court not to interfere in the course of state proceedings.

But this case is a little different, isn't it, in that there is here a factual conflict or a factual conflict of jurisdiction between Federal and State bodies over the subject matter?

Mr. Phelps: That is true, Your Honor.

Judge Goodman: So there might not be any reason at all [fol. 425] for the Federal government not to interfere because you have the theory that the Federal law is supreme in the field and should operate and therefore it wouldn't be restricted by any prohibition against asserting that jurisdiction as against the jurisdiction of the State court.

Mr. Phelps: The only thing that I can say, Your Honor, is that for this Court to entertain this complaint and to adjudicate on the question involved here—in effect, restrain the action of the local, state regulatory body, and that is precisely the thing which is inimicable to the principle announced in the Alabama case, it disturbs, shall we say, that balance, that delicate balance, as Justice Frankfurter called it, between the State and Federal governments and strikes at the harmonious relationships between the Federal and the State Governments.

The Court: Well, if we were to have a state court determine what rights a Federal agency had, they might try to restrain the Federal agency. They couldn't do it. But there is the situation. You have got a Federal agency and a State agency asserting conflicting jurisdictions; in other words, you have got a State agency asserting a jurisdiction in which the Federal agency claims complete control.

Mr. Phelps: That is true, Your Honor, but——

Judge Orr: And why wouldn't a Federal court be the appropriate place to have that resolved?

[fol. 426] Mr. Phelps: Whatever action the State Commission and ultimately the State Court would take is always subject to review by the United States Supreme Court.

Judge Goodman: Only by way of certiorari.

Mr. Phelps: Yes, it is subject to review.

Judge Goodman: And Justice Frankfurter tells us all the time——

Judge Orr: Here you have a direct appeal to the Supreme Court from the decision of this Court, a right of appeal.

Mr. Phelps: That is true. But I don't understand that the parties would be prejudiced by pursuing their remedies through the State courts if they raised in the State courts the ground and argued that the action of the State commission was unlawful interference with interstate commerce and raised that Federal question. Not only would the California State Supreme Court take cognizance of their argument but if the California State Supreme Court ruled that the State Commission did have jurisdiction and on certiorari the United States Supreme Court—on a petition for certiorari the United States Supreme Court was of the opinion that the California court was wrong, I am satisfied that the parties would not suffer from any failure to act by the United States Supreme Court.

Judge Goodman: A litigant is one that would like to be sure of that. But unfortunately the Supreme Court only [fol. 427] takes over the cases it wants to, whether the litigants feel the case is unlawfully decided or not.

Mr. Phelps: The party would have a right of appeal—not a right of appeal but they—but what they would request would be to the United States Supreme Court, would not be a writ for certiorari, it would be a right to present an appeal, which is a little bit different, I think, although——

Judge Orr: Not in the State court, it wouldn't—from the State Court. There is a right of direct appeal from this three-judge court, but there wouldn't be in the State court. That would be just another petition for certiorari.

Mr. Phelps: No, Your Honor, I think the way you go up from the decision of the State Supreme Court is on a petition for appeal, and I think that is not quite the same as a petition for writ of certiorari, and it gives you the opportunity, if previous experience is the guide, to present to the United States Supreme Court fully the grounds for relief.

Judge Orr: In effect, it is the same thing, isn't it? You petitioned for appeal, and you say, no, you can't appeal or you issue writ of certiorari, and you say no. That is the same thing. They don't write an opinion on it.

Mr. Phelps: I would suppose—I haven't explored it, but I would suppose that any appeal from this court to the United States Supreme Court, although the law does provide for so-called direct appeal without the necessity of [fol. 428] going first to the Court of Appeals, that the United States Supreme Court could dismiss that appeal without going all the way, without going so far as to hear the parties in argument, to determine on briefs whether or not they would accept the appeal.

Judge Goodman: It doesn't go by certiorari.

Mr. Phelps: No, it does not. If I understand the procedure——

Judge Orr: We think you have reached the point where we give you five minutes notice. You can go ahead for five minutes.

Mr. Phelps: I think I am nearly through. There are one or two more cases which I have not yet referred to which I will ask the Court to note.

Judge Goodman: They are not in the brief?

Mr. Phelps: No, they are not. They are in this—the current of these cases, this line of cases involving the so-called doctrine of abstention. They are Beal vs. The Missouri Pacific Railroad Corporation, 312 U. S. 45, 85 Lawyers' Edition 577. Eccles vs. Peoples Bank, 333 U. S. 427, 952 Lawyers' Edition 784.

Judge Orr: The page on 333 U. S., please?

Mr. Phelps: 427. 92 Lawyers' Edition, 784. And finally Federation of Labor vs. McAdory, 355 U. S. 453, 89 Lawyers' Edition 1725.

[fol. 429] I might say Judge McKeage just advises me that there is a right of appeal as distinguished from certiorari, Your Honor, from a decision of a state supreme court, appellate court, to the United States Supreme Court.

Judge Goodman: What sort of cases? You mean in civil litigation? There isn't a right of appeal from a state supreme court, the highest court.

Mr. Phelps: I wouldn't put it as a right of appeal but the method of going up is on petition for appeal as distinguished from a petition for writ of certiorari.

Now I might make one more observation, if I may, the cases that were cited by Mr. Ozment I note were all decided before the Alabama Public Service Commission case, and

I think to that extent they are inconsistent with that Alabama case. That is all I have to say, Your Honor.

Judge Orr: The matter may be submitted?

Mr. Treadwell: Yes, Your Honor. I only want to call Your Honor's attention just to one matter. On this argument the Court should await decision by the state courts: that was presented on the motion for dismissal and was fully argued, but the latest case on that subject is a case of Pennsylvania Greyhound Lines vs. Public Utilities Commission. That has not yet been reported, Your Honor, so we have made copies of the decision, and we filed three copies, Your Honor, with the Court.

[fols. 430-431] Judge Orr: What court decided this case?

Mr. Treadwell: The District Court of New Jersey, and what they held, very applicable to this case, was without disturbing that rule they said it had no application where the question was a meaning and effect of the Federal statute, and that is the point we have here. I prepared a little memorandum of the matters which were new and I would like to file three copies of that memorandum. It's only a few pages.

Judge Orr: What is this?

Judge Goodman: You have furnished copies to counsel?

Mr. Treadwell: I will do that.

Mr. Phelps: I have just one more word, if I may, Your Honors. I am reminded in the Alabama case, in response to an observation of yours, Judge Goodman, that in that Alabama case the railroad was asserting a constitutional right, as you stated, and the railroad was denied relief, whereas here the parties are merely asserting an interpretation of a Federal statute. So the difference between the two cases, it seems to me, is such as to make the case even stronger for denying relief here, where the United States Supreme Court in the Alabama case denied the relief even though a constitutional right was said to be infringed.

Judge Orr: We will read that case.

Submitted.

[fol. 432] IN DISTRICT COURT UNITED STATES

Transcript of Proceedings on Motion for New Trial

Thursday February 19, 1953.

APPEARANCES:

For the Plaintiffs: Messrs. Treadwell & Laughlin, by Edward F. Treadwell, Esq., and Colin C. Kelley, Esq.

For the Defendants: Everett C. McKeage, Esq., J. T. Phelps, Esq., Wilson E. Cline, Esq.

For the Intervenors: C. Elmer Collett, Esq., Assistant United States Attorney.

[fol. 433] The Clerk: United Air Lines versus The Public Utilities Commission of the State of California, hearing on motion for new trial.

Judge Orr: How much time would you like to have, gentlemen?

Mr. Cline: I would like to have at least half an hour, if I may.

Judge Orr: You may have half an hour a side.

Mr. Cline: Do you wish me to proceed at this time?

Judge Orr: Yes.

ARGUMENT BY MR. CLINE FOR DEFENDANTS

Mr. Cline: Thank you, Your Honors.

Your Honors, before proceeding I again should like to read to you Section 20 and Section 22 of Article XII, the California Constitution, so that you will have it well in mind during the course of this argument. Section 20 reads:

> "No railroad or other transportation company shall raise any rate or charge for the transportation for freight, of passengers, or any charge connected therewith or incidental thereto, under any circumstances whatsoever except upon a showing before the Railroad Commission, provided for in this Constitution that such increase is justified, and the decision of said Commis- [fol. 434] sion, upon the showing so made, shall not be subject to review by any Court except upon the question whether such decision of the Commission will result of confiscation of property."

Then the part of Section 22 which I wish to read is as follows:

> "Said Commission shall have the power to establish rates and charges over the transportation of passengers and freight by railroads and other transportation companies, and no railroad or any transportation company shall charge or demand or collect or receive a greater or lesser or different compensation for such transportation of passengers or freight or for any services in connection therewith between the points named in any tariff or rates established by said Commission than the rates, fares and charges which are specified in such tariff."

I wish to say that this Section 22 of Article XII, California Constitution, is the authority upon which the California Public Utilities Commission asserts jurisdiction over the rates of the plaintiff in this case.

I read the transcripts of record in the proceedings, the briefs, very carefully, and to my mind there is considerable confusion respecting the penalty actions which have been instituted by the Public Utilities Commission against [fol. 435] the plaintiff, United Air Lines, arising out of the other action. Since those penalties have been referred to in the findings of this Court, I think it is proper that I explain the situation rather completely so that you will have a full understanding of it.

Prior to March 1st, 1951 United Air Lines had tariffs on file with the Public Utilities Commission covering its coach fares between San Francisco and Los Angeles, and these fares were thereby established by the Commission under Section 22 of Article XII of the California Constitution.

United, Prior to March 1st, 1951, applied to the Public Utilities Commission for authorization to increase such coach fares on March the 1st. The Commission refused to grant the application because insufficient information had been furnished. Nevertheless, on March 1st, United increased its fares. Subsequently the Commission issued a decision effective May 9, 1951, authorizing United to increase its fares and ordering United to make reparation of the excess fares collected between March 1st, 1951 and May the 8th, 1951, inclusive.

A petition for writ or review of this decision was filed with the California Supreme Court. The writ was denied. An appeal was taken to the United States Supreme Court. This appeal was dismissed on the ground that no substantial Federal question was involved. Subsequently the State of California filed penalty action under Section 2107, with [fol. 436] which I believe you are fully familiar, of the Public Utilities Code. These actions were filed by reason of United's violations of Sections 20 and 22 of Article XII of the California Constitution. No other statute or order of the Commission had been violated.

Now let's look to the facts of this case. The Commission has not yet established rates for United's Catalina operations under Section 22 of Article XII of the California Constitution. There is no provision in the Public Utilities Code which requires air carriers to file tariffs. In that connection I refer the Court to paragraph 12 of the findings which states that:

> "Statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that operations are conducted by carriers without effective tariffs being on file with the defendant Public Utilities Commission."

I again say there is no provision in the Public Utilities Code and there is no provision in the constitution which requires these air carriers to file tariffs. The only provision is the provision of Section 22 which authorizes the Commission to establish rates.

I may say, one way of establishing rates is accepting tariffs which are offered for filing by the air carriers. In this case they refused to do so and there have been no rates [fol. 437] established under Section 22. Hence, United has not subjected itself to any penalties by reason of violation of the provision—of any provision of the constitution or any provision of any Public Utilities Act.

The letters from the Commission's secretary are not orders from this Commission which will support a penalty action or a contempt proceeding for refusal to comply therewith, as they do not comply with the procedural provisions of the Public Utility Act which have been set forth in the motion for new trial. In other words, these letters

are not enforceable orders of this Commission. They are merely notice to United that the Commission is commencing its administrative process.

To show that there was no confusion in this respect in the mind of counsel for United, let me read from the transcript of the hearing for preliminary injunction, August 8, 1952. I refer to page 49:

> "Judge Orr: It is our thought, Mr. Treadwell, that right now your job is to convince us that this is the proper forum to bring this action before.
>
> "Mr. Treadwell: Oh, yes, I will be glad to do that.
>
> "Judge Orr: We are more concerned about that right now than any other phase of the case.
>
> "Mr. Treadwell: Well now, the situation is this, [fol. 438] Your Honor, on that: If the Public Utilities Commission had made some order which controls this route, undertook to control the route, there is no doubt that the proper procedure would be a writ of review from that order to the Supreme Court of the United States. That would be what would be the actual way to proceed, the way you could proceed.
>
> "But there is nothing of that kind here. There is no order. We have waited now a minimum of six years, and probably much longer, according to the allegation of the complaint."

Also referring to page 62:

> "If the Commission only threaten something or if they actually had done something, if they actually had done something, our remedy of course would be to go to the Supreme Court for right of review."

I also refer you to the Answer which has just been filed today of United. Page 7, top of the page:

> "*Catalina Case.* There was no litigation, nor was there any existing administrative action concerning the route at the time that the suit was commenced."

I think that clearly shows there was no misunderstanding on the part of United.

[fol. 439] Further, any doubt about this question should have been resolved by the statements of Mr. Phelps and the testimony of Judge McKeage which we have quoted on page 12 of the Motion for New Trial.

No penalty actions will be brought because of United's prior and present refusal to file with this Commission tariffs covering its Catalina operations, not only because there is no justification for bringing a penalty action but there is no legal basis for bringing any penalty action at the present time.

Assuming that the letters from the Commission's secretary are enforceable and appealable orders, that they have become final, no petition for rehearing has been filed with the Commission and no petition for writ of review has been filed with the California Supreme Court.

I might say, however, that whatever constructive effect is given to these letters by the Federal Courts, I am confident that the Commission, if permitted to do so, will not treat these letters as enforceable orders but will institute an investigation on its own motion should United still refuse to file its tariffs. Justice would require that United be given such an opportunity to appear before the Commission in accordance with established procedure.

Judge Goodman: Didn't Mr. McKeage testify that these letters were written after he gave his opinion that the [fol. 440] Public Utilities Commission had jurisdiction and that it was his belief that they had jurisdiction?

Mr. Cline: Yes. It certainly is still his belief that they have jurisdiction.

Judge Goodman: Isn't then the rest of that a lot of folderol?

Mr. Cline: Not necessarily. There may be some cases that are presently——

Judge Goodman: And the Commission is going to go through some motions to determine that which it has already decided?

Mr. Cline: That is the administrative process, Your Honor. After all, at the time that those letters were issued, the plaintiffs in this case had not had an opportunity to fully present their aspects. There were no facts which the Commission had to consider. It was just based on hear-

say, you might say, matters of its own general information and knowledge. They were just preliminary to the administrative process. They were by no means the end of the process. And I might say at this time too that that certainly is a matter which should be decided by the California Supreme Court rather than by the Federal Courts, the effect which should be given to letters of a secretary of our Commission. Although this Court, of course undoubtedly in the decision of this case, has made a determination with respect to them, I don't think that that determination would [fol. 441] be binding on the California Supreme Court if such matter were reviewable by them in connection with another matter, in the same way that you wouldn't be bound by a ruling of the California Supreme Court in respect to the effect of the letters.

Judge Goodman: Isn't the demand that an administrative hearing be held by the Commission an assertion of the jurisdiction?

Mr. Cline: I am coming to that next, Your Honor.

Judge Goodman: It seems to me that in the case where the Federal Commission is exercising jurisdiction, the fact that the State Commission says: We want to assert jurisdiction, that it doesn't make much difference what form that assertion of jurisdiction takes, that creates the issue then—doesn't it?

Mr. Cline: The only threat of assertion of jurisdiction that is admitted and the only threat that exists at the present time is the intention on the part of the defendant Commission, if permitted to do so, to institute an investigation on its own motion. The only action taken by the Commission to date has been preparatory to the institution of such an investigation. The appearance and defense of United in such investigation would not impose irreparable injury on United in an equitable sense. Otherwise in every case where the jurisdiction of the Commission is questioned, application could be made to this Court for relief on the [fol. 442] ground that the Commission actually doesn't have jurisdiction, the parties being subjected to an irreparable injury unlawfully. Due process contemplates the type of injury which may be sustained in an appearance before administrative agencies and Courts even though it may

ultimately be found that the agency or Court has no jurisdiction.

Judge Goodman: If the Civil Aeronautics Authority has exercised jurisdiction Federally (as I remember, the Civil Aeronautics Authority has exercised jurisdiction over rates between California and Nevada); and then the State of California Commission sent a communication or announces that it was going to hold a hearing to determine the matter of jurisdiction, do you think or is it your point that this Court would have no jurisdiction, that it would have to wait until the California Commission held a hearing to determine that matter?

Mr. Cline: That is correct.

Judge Goodman: What authority is there for that?

Mr. Cline: There is the authority that the California Public Utilities Commission has the right to make such investigations as it deems necessary to enable it to carry out its functions under the law.

Judge Goodman: Even if it is clearly in the Federal field?

Mr. Cline: That is where we disagree with you. We say [fol. 443] it is not clearly in the Federal Field.

Judge Goodman: Let's take a case where it was purely Federal.

Mr. Cline: If we admitted it was purely Federal——

Judge Goodman: If your contention is that it is purely Federal, the Federal Court couldn't have any jurisdiction and it had to allow the State Court, the State Commission, to determine that question?

Mr. Cline: My position is that where the matter is not clearly settled, where it is still up in the air and it is questionable, that the Public Utilities Commission has the right, on its own motion, to hold an investigation and to determine the jurisdictional question.

Judge Goodman: Then your point is purely as to the timeliness, the timing of the proceeding?

Mr. Cline: That's correct.

Judge Goodman: Rather than the fundamental principle that is involved?

Mr. Cline: That's correct. As I say, if the Commission was of the opinion that the matter was clearly settled, we would not be here.

In that connection I wish to refer to the case of Petroleum Company versus Public Service Commission 304 U. S. 209. That case said that the expense and allowance of litigation is part of the social burden of living under government. [fol. 444] When the only ground for interfering with the state procedure is the cost of preparing for a hearing, there is no occasion for equitable intervention.

The majority of the Supreme Court in the case of Public Utilities Commission versus United Fuel Gas, referred to in the intervenors answer to our motion for a new trial, distinguishes this case on the ground that the appeal to equity sought to anticipate the appropriate exhaustion of administrative remedies and that the regulation of intra-state rates was alone involved. In the case at hand the plaintiffs are seeking to anticipate the administrative process, and our position is, of course, that the rates are intra-state instead of inter-state rates.

In this connection I refer to a question by Judge Goodman on page 31 of the transcript of the hearing August the 8th, 1952:

> "Judge Goodman: Would there be any more reason for the Congress wanting to regulate the rates in a case where an airplane went from one point in California to another point part of the way over another state any more so than in the case where it went from San Francisco to Los Angeles and over a part of the water, the Pacific ocean; what is the difference there?"

The answer to this question is an unequivocal yes, that [fol. 445] there is a difference. If Congress didn't provide for regulation of the rates between points in California, when part of the flight, for example, was over Nevada, there would be no regulation whatsoever. That's clearly interstate commerce under the Interstate Commerce Clause of the Federal Constitution.

I refer you to the case of Hanley versus Kansas City Southern Railway, 187 U. S. 617 at page 620.

On the other hand, if Congress hasn't provided for regulation of the rates between San Francisco and Los Angeles where part of the flight is over the high seas, California can regulate such rates because here only one state is involved and such rates are a matter of local concern.

There we again refer you to the case of Wilmington Transportation Company versus Railroad Commission, 236 U. S. 151 at 156.

The legislative history of the Civil Aeronautics Act clearly shows that the Federal Authority has not preempted the field of regulation of intrastate rates. I might say that we have briefed that very fully in our brief to the United States Supreme Court. I intended to read you sections of it showing that there was clearly no intention to preempt the field of regulation of intrastate rates by Congress. I don't believe I will have time here. There are quite a number of——

[fol. 446] Judge Goodman: There isn't any question about that.

Mr. Cline: Fine.

Your Honors, next I shall like to have the Court consider the case of Public Service Commission of Utah versus Wycoff Company, Inc., 344 U. S. 237. The facts have been set forth in our motion for new trial. I do wish this Court, however, to carefully consider certain statements appearing in the opinion of the Supreme Court in their application to the case presently under consideration by this Court.

First I refer to the statement—I have before me here the Lawyers Edition. It may not be too easy to follow unless it relates to Head Note 1. First I refer to the statements in addition to the effects that will appear in our discussion of the declaratory relief.

> "It is wanting in equity because there is no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief by injunction."

That statement there doesn't say that there was no proof of any threatened or probable act. It merely says that there was no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief. And that is what I want to point out. There was evidence of threats.

Further on, the Court itself says in the majority opinion:

> [fol. 447] "We may surmise that the purpose to be served by a declaratory judgment is ultimately the

same as respondent's explanation of the purpose of the injunction it originally asked, which is

'To guard against the possibility that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission.'

"In this connection Wycoff versus Public Service Commission——"

Utah Supreme Court case,

"—is brought to our attention. From this it appears that respondent and its predecessors in interests long made it a practice to obtain from Utah Commission certificates to authorize this carriage of film commodities between points in Utah. But the Supreme Court in Utah, in the cited case, sustained the Commission in denying such an application upon a finding that the field already was adequately served. We are also told that the Commission filed a petition in Utah State Court to enjoin respondent from operating between a few specified locations within the state, but that process was never served and nothing in the record [fol. 448] tells us what has happened to this action. We may conjecture that respondent fears some form of administrative or judicial action to prohibit its service on routes wholly within the state without the Commission's leave. What respondent asks is that it win any such case before it is commenced."

I also wish to read a part of a statement of facts by Mr. Justice Douglas in his dissenting opinion. He states:

"Respondents hold a certificate of public convenience and necessity from the Interstate Commerce Commission for the transportation of motion picture films and news reels from Salt Lake City, Utah, to points in Utah, Idaho and Montana. Their transportation to Utah points is interstate commerce according to the Court of Appeal; and with that conclusion I agree since the movement in Utah is part of a continuing interstate stream. The threat of interference with that interstate activity by the Utah Public Service Com-

mission is clear and immediate. First. The Utah Commission brought suit to enjoin those interstate activities and that suit is now pending in the Utah Court. Second. The Commission's answer in the District Court denied that it was interfering with interstate commerce, not because it did not intend to prevent respondent [fol. 449] from operating, but on the ground that the operations were deemed to be intrastate commerce and therefore subject to its regulation. Similarly, the District Court's finding that there was no interference with interstate commerce was based on an acceptance of the Commission's contentions as to the nature of respondent's business.

"In their brief here petitioners assert that the Utah Commission *'will prevent the respondent from conducting'* this business *'unless and until he is authorized to do so by appropriate administrative order'* of the Utah Commission, since in the Commission's view the transportation is in intrastate commerce."

And omitting some:

". . . I have said enough to show that the judges who heard this case below knew that they were dealing with a live, active contest that threatened serious consequences to respondent, not with a hypothetical question that might have practical repercussions only in the remote future."

The next statement to which I would like to direct this Court's attention is:

". . . this dispute has not matured to a point where we can see what, if any, concrete controversy will [fol. 450] develop. It is much like asking a declaration that a state has no power to enact legislation that may be under consideration but has not yet been shaped up into an enactment. If there is any risk of suffering penalty, liability or prosecution, which a declaration would avoid, it is not pointed out to us."

In that connection I would like to say that a rate order of the Public Utilities Commission is a legislative act of

an administrative body, and I have outlined to you the procedure which must be followed by the Commission in enacting such legislative acts. There has been no such procedure followed by the Commission, and the status at the present time is the same as though there is no legislation whatsoever on this subject matter.

> "Even when there is incipient Federal-State conflict, the declaratory judgment procedure will not be used to pre-empt and pre-judge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National [fol. 451] Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance . . .
>
> "But, as the declaratory proceeding is here invoked, it is even less appropriate, because, in addition to foreclosing an administrative body, it is incompatible with a proper Federal-State relationship."

I think that is just exactly the situation we have here.

> "Declaratory proceedings in the Federal Courts against state officials must be decided with regard to the implications for our Federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders . . ."

That is not done by this Commission as yet.

> ". . . and the primary right to take evidence . . ."

We have taken no evidence.

> ". . . and make findings of fact."

There have been no findings of fact made by the Public Utilities Commission.

"It is the State Courts which have the first and last word as to the meaning of State Statutes . . ."

The State Court should determine the meaning of those letters written by the secretary of the Commission.

[fol. 452] ". . . and whether a particular order is within the legislative terms of reference so as to make it the action of the state. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by the Courts of the state affected. Anticipatory judgment by a Federal Court to frustrate action by a state agency is even less tolerable to our Federalism."

Judge Goodman: We didn't make any decision that had for its effect the interpretation of the meaning of any statute. We simply held the Federal Statute that the Federal Agency had——

Mr. Cline: That was by way of defense, and we will come to that in a minute.

"Is the declaration contemplated here to be res judicata . . ."

Skipping down——

"The procedures of review usually afford ample protection to a carrier whose Federal rights are actually invaded. and there are remedies for threatened irreparable injuries. State Courts are bound equally with the Federal Courts by the Federal Constition and laws. Ultimate recourse may be had to this Court by cercaria if a state court has allegedly denied a Federal right.

[fol. 453] "In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed."

Now this is the part that I am referring to.

"The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts."

And that is exactly what this plaintiff is doing before this Court. It is coming before this Court and asking you to make a determination which will serve as a defense in any proceeding which the Public Utilities Commission of the State of California might institute.

Judge Goodman: I don't see where you get that from, counsel, on the record in this case?

Mr. Cline: Well, we are not making any claim under Federal Statute. Our only claim is under the article, Section 22 of Article XII of the Constitution.

Judge Goodman: The plaintiff is coming in and saying: We are now being regulated by the Federal Agency and the State Agency wants to regulate us.

Mr. Cline: Why is he here, he is here because we say we are going to regulate him under——

Judge Goodman: He doesn't want to get caught in between the two juggernauts approaching him, one from each side, and he doesn't want to get caught in between.

[fol. 454] Mr. Cline: He is here because we are making a claim under a provision of the Constitution of the State of California. We are not making any claim under Federal Statute. That is what he will assert as a defense, and that is what a language says he will not be permitted to do.

Judge Orr: They don't say that.

Mr. Cline: Yes they do. They say he shall not be permitted——. Let me finish reading this and we will discuss further, if you will permit me to do so.

Judge Orr: Just a moment, please. I would like to ask you a question.

Mr. Cline: Surely.

Judge Orr: I have in mind this. Isn't the situation somewhat reversed, what you are speaking of? This isn't a question where the Government is attempting to meddle in state affairs. It is a question where they are stopping the state from meddling in the Federal affairs.

Mr. Cline: We are not trying to meddle in Federal affairs. What we are trying to do is exercise our authority under the Constitution of the State of California.

Judge Orr: I had this in mind, aren't you trying to usurp jurisdiction where you haven't got any? In other words——

Mr. Cline: If we accept your view of the cases, yes. If

we say that the Federal Government has pre-empted the field of regulation, we have no authority to regulate this [fol. 455] route. But that's deciding the matter before it is even heard by the state body.

Judge Goodman: Counsel, why shouldn't it be decided before the state body decides it?

Mr. Cline: Because that is a matter of defense. Under the Federal Statute that is set up as a matter of defense.

Judge Goodman: What do you mean by that?

Mr. Cline: Let me read this language.

Judge Goodman: You mean to say that it clearly appears that the Federal Agency that's got authority and decides that it has authority, that it has to wait until the state agency decides the question? What does the matter of defense have to do with it?

Mr. Cline: Well, let me read this language.

Judge Orr: I don't know whether I am following you correctly or not. You can clear me up if I am not.

Mr. Cline: This is the picture——

Judge Orr: In other words, according to the way I am getting it, you are saying that the Federal Court must hold its hand until such time as the State Court makes a determination on whether——

Mr. Cline: My point is this——

Judge Orr: —whether this is Federal question or not.

Mr. Cline: My point is that this Federal issue can just as satisfactorily be decided by permitting the Commission [fol. 456] to hold its order of investigation, permitting the matter to go to the California Supreme Court, and then directly to the United States Supreme Court. The Federal issues will be fully protected under that procedure. And, I may say that that procedure is a very fast procedure.

Judge Orr: Won't it be just as fast, here Mr. Cline, just as fast decided here if you appeal to this Court?

Mr. Cline: The difficulty there is—so the California Supreme Court says at any rate—the fundamental obligation of the State Courts is to decide questions of state law. It very well may be, when this matter goes up to the State Supreme Court of the State of California, if it does, that they will have exactly the same attitude towards the Federal question that you have, and they will be obligated to decide it in the same way.

Judge Orr: I take this view, we are not stating that the State of California has a right to decide questions of state law. Their law may be entirely valid. The operation of the commission under that law within the orbit that they are authorized to act may be perfectly valid. But in the state the state has not said to its Commission that you shall have authority to regulate interstate commerce. Now here we are asked to say: Is this interstate or is it intrastate. If it is interstate commerce, you admit, I imagine, that you have no business trying to regulate it. If it is intrastate why, [fol. 457] you do. We said to you in the decision that this is interstate commerce, or an interstate transaction solely within the regulation by the Federal Commission and that you are without authority to act.

Mr. Cline: Our position is——

Judge Orr: Granting all, everything that the State Statute authorizes you the right to do is legal, if you stay within that. But if you step out of the orbit of that authorization and try to operate in interstate commerce, in which you have no authority——

Mr. Cline: That is a matter of defense. The difficulty here is that you have already made your decision that it is interstate commerce.

Judge Orr: Yes.

Mr. Cline: As far as you are concerned. If that matter were questionable in your minds I think it would be easier for you to follow the language of this decision and the argument which I am making—if you felt that it was. But the difficulty here is that you have already decided this is interstate commerce and there is no question in your mind that it is interstate commerce. But——

Judge Goodman: Why isn't it interstate commerce?

Mr. Cline: Why isn't it interstate commerce?

Judge Goodman: Yes.

Mr. Cline: Under our interpretation of the Civil Aero- [fol. 458] nautics Act the use of the language there is meant to apply to the situation of interstate commerce where the flight goes through another state rather than over the seas.

Judge Goodman: But the statute says: "Goes over the water."

Mr. Cline: It is our——

Judge Goodman: You are fighting the statutes, aren't you, there? The statute specifically says——

Mr. Cline: It does not say "Over the water." It says any place outside thereof. Now there is a matter pending before the United States Supreme Court at the present time in which the State of California is claiming jurisdiction over the waters between Catalina——

Judge Orr: Has that been accepted by the Supreme Court?

Mr. Cline: Has the Master's Report been accepted?

Judge Orr: Yes. I mean, when will we get a decision on that?

Mr. Cline: I don't know. But certainly until the Supreme Court adopts the Master's Report on that, the matter is open for further consideration. And then, in addition to that, we don't know what this session of Congress is going to do. They may very well decide that the State of California is entitled to exercise jurisdiction over those waters. We don't know. And, as I say, that matter is up in the air.

[fol. 459] Judge Goodman: Well, you concede that there is Federal jurisdiction if the airplane goes from San Francisco over a part of Nevada to Los Angeles?

Mr. Cline: Yes.

Judge Orr: That is interstate commerce?

Mr. Cline: That is interstate commerce.

Judge Goodman: What is the difference if it goes from San Francisco out into the Pacific ocean and then to Los Angeles?

Mr. Cline: Congress has a definite interest in providing regulation when the flight goes over Nevada. California can't regulate that; Nevada can't regulate that. It is interstate commerce under the Interstate Commerce Clause of the Constitution. Now as to flights which go out over the Pacific ocean, true enough the United States has an interest and California has an interest. It is a matter of local concern primarily with California, but the United States has an interest not only with flights which go out over the high sea but they have an interest over flights within the State of California. They regulate it from the point of view of safety regulations. And our point is that Congress did not intend, through the enactment of the Civial Aero-

nautics Act, to put within the scope of the regulation by the Civil Aeronautics Board matters of local concern which can be regulated by the State of California. As to those [fol. 460] matters which can't be regulated by the State of California, where they go through Nevada, Congress certainly had reason to enact that legislation.

Judge Goodman: That is a primary question that you can raise on appeal, can't you?

Mr. Cline: Yes. What we object to is the possibility of our being put to the expense of coming before this Court every time anyone raises a question as to our authority to act or as to our jurisdiction.

Judge Goodman: You just take an appeal from this decision to the Supreme Court, and if we are wrong on the question as to interpreting what it means by saying "A place outside of the state," that will settle it, won't it?

Mr. Cline: Our opinion is that if we take an appeal, the United States Supreme Court won't get to that point.

Judge Orr: I think if your theory is right, that this is intrastate commerce, we are wrong.

Mr. Cline: There is a point that I have to reach before you get that. Let me read the rest of this paragraph here:

> "If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under Federal law, it is doubtful . . ."

We are making no claim whatsoever under Federal law. We are certainly the declaratory defendant and we are the only one whom the plaintiff says has threatened to take any action.

> [fol. 461] ". . . it is doubtful if a Federal Court may entertain an action for declaratory judgment establishing a defense to that claim."

And that would certainly clearly be a defense. They will come in and say: You have no jurisdiction. Why do you have no jurisdiction? For the reason that Congress has pre-empted a field of regulation in these rates insofar as the Catalina operation is concerned.

> "This is dubious even though the declaratory complaint sets forth a claim of Federal right, if that right

> is in reality in the nature of a defense to a threatened cause of action."

And that is exactly what we have here.

> "Federal Courts will not seize litigations from State Courts merely because one, normally a defendant, goes to Federal Court to begin his Federal-law defense before the State Court begins the case under state law."

Now we have one more short paragraph which I would like to read before we leave this case.

> "Since this case should be dismissed in any event, it is not necessary to determine whether, on this record, the alleged controversy over an action that may be begun in the state court would be maintainable under [fol. 462] the head of Federal-question jurisdiction. But we advert to doubts upon that subject to indicate the injury that would be necessary if the case clearly rested merely on threatened suit in state court, as for all we can learn, it may."

Judge Murphy: Right there you seem to get at the nub of our decision. We held as a matter of fact intent is a question of fact, that you had threatened irreparable injury. We found that.

Mr. Cline: You found it as a fact, but will it be supported by the record?

Judge Murphy: I think so.

Mr. Cline: There may be irreparable injury? There may be injury, but is it a type of irreparable injury which entitles this Court to grant the equitable relief requested? That's another question. The two cases are very very similar.

Judge Murphy: If the United had to come in and defend itself against proceedings taken before the Commission which would certainly result in an expenditure of considerable thousands of dollars, might not that be interpreted as an irreparable injury?

Mr. Cline: Well, on the other hand, would you say that the State of California is suffering irreparable injury by reason of the fact that we have to come before this Court

to defend ourselves? The obvious—the answer is obviously [fol. 463] no. The answer in the other case is no. It is the type of injury that our society expects its members to sustain.

Judge Murphy: That is under your theory of the ordinary cost of Government.

Mr. Cline: Suppose we go up to the Supreme Court and this Court is reversed and we have to go through all the other procedure, we have sustained injury. But there is no place we can go to recover it.

Judge Murphy: But is that——

Mr. Cline: My point is, had they awaited our order of investigation, taken the matter up through the normal channels, up to the California Supreme Court, to the United States Supreme Court if necessary, then the matter could have been decided just as inexpensively, just as expeditiously, and there would not have been the element of this friction between the State and Federal Government. You have the United States Supreme Court resolve the Federal issues. Before the matter gets to the United States Supreme Court, the State Court has settled all the state issues that are involved.

Judge Goodman: I don't see that there is any difference in what you say as to the form of the appeal. If you take an appeal here and you lose, you will have to go through with your procedure.

Mr. Cline: No. If we *we* take an appeal and we lose——

Judge Goodman: If you win, you will then, in the regular [fol. 464] course of events, assert your—wait a minute—wait a minute now. Now, what would have happened if the matter proceeded without the intervention of the Federal Court, and the United having an adverse judgment against you in the State Supreme Court, and you took the petition for review to the Supreme Court?

Mr. Cline: I might say this, that if we had an adverse judgment against us by the State Supreme Court of the State of California, we very likely would let the matter stop there.

Judge Goodman: Now you are talking about practical things instead of law.

Mr. Cline: From a practical point of view, the State Public Utilities Commission of the State of California if it has

an adjudication by the State Supreme Court of the State of California would feel that it has gone as far as is necessary or practical for it to go. Now we don't have the same thing here.

Judge Orr: There is some assurance in the case, sure, that penalties will not be imposed. But I think in the first instance——

Mr. Cline: That is the point I want to bring out. It's a new point, a new approach that we developed today.

Judge Orr: I wonder if you would permit me to finish?

Mr. Cline: Excuse me, Your Honor.

Judge Orr: I have this in mind, that I think the activat-
[fol. 465] ing motive in the first instance in bringing this action was the fear of imposition of this thousand dollars a day—isn't it?—or something of that kind—that penalty, and if they waited some length of time and finally lost out that would be a rather irreparable injury, and they were in a sort of a, as Judge Goodman put it, between two pincers here.

Mr. Cline: If you want——

Judge Orr: If they were to stand by and let you go ahead and you saw fit later to impose those penalties, they were in a bad fix.

Mr. Cline: Those are the allegations in the complaint. I have attempted to point out today there is no foundation in law for the imposition of such penalties. The only authority that we are operating under, that we are seeking to exercise jurisdiction at the the present time, is the authority to establish rates. Now there is no provision in the Public Utilities Code which says that United has to file tariffs with the Commission.

Judge Orr: What would you do if they don't comply?

Mr. Cline: What do we do if they don't comply? We have two alternatives. One,—well, the first alternative—only one course, is to institute an order of investigation on our own motion. Of course someone on the outside can file a complaint with us. But since we are aware of the situation, we would undoubtedly institute the motion, the investiga-
[fol. 466] tion, on our own motion. Now at that time we could go into their rates and elicit information and find out whether or not those rates were reasonable and just,

and if they were not reasonable and just we could establish rates which we think were reasonable and just. The other alternative is to say: Well, these are the rates you have been charging over a period of time. We assume they are reasonable, unless someone comes in and complains. Therefore, all we will do is direct you to file a tariff. And then after we have our investigation, follow the procedure that is outlined in the Public Utilities Code, we will issue an order. Now that order will not be in force until it becomes final. And the procedure contemplates that the defendant, a would be defendant before us or the respondent, would file a petition for rehearing, and the Commission would review the matter again. The matter is brought up on petition for rehearing. And if we deny the petition for rehearing, the plaintiff, United, could go to the Supreme Court of the State of California and get a stay order which would stay the effect of the decision until such time as the Supreme Court of the State of California had rendered its decision, and then if the decision of the Supreme Court of the State of California was in favor of the Commission they could get the same type of stay granted by the United States Supreme Court.

Judge Murphy: Would those rates that you would have [fol. 467] originally established become retroactive as of the date of the first hearing?

Mr. Cline: So long as they didn't increase the rates, we would have no cause of action to institute—I mean, no right to institute penalty actions. However, as I pointed out to you, Section 20 and Section 22 of the California Constitution say that "No railroad or other transportation company shall increase its rates without establishing that they are reasonable."

Judge Goodman: Well, I think that all that you have said, counsel, might have some applicability if you had an ordinary case where some air line company or other concern was complaining against some order of the state body. But this is a case where it is peculiarly necessary, it seems to me, for the imposition of equity, because this concern in the particular area concerned has been under Federal regulation for a number of years and, being under Federal regulation, it finds itself confronted with the claim of state

jurisdiction. Why shouldn't it go into the Federal Court and ask for relief under thos- conditions, and under conditions where we find that the Federal Agency intervenes and takes the part of the plaintiff and aligns itself with it and says, yes, we have been regulating this plaintiff and we have exercised jurisdiction. Now under those conditions isn't it reasonable, in the exercise of its jurisdiction, for [fol. 468] the Federal Court to determine that matter? It isn't like the ordinary case that you were speaking of and that you have reference to.

Mr. Cline: I have to come back to the language of the Supreme Court in the Public Service Commission of Utah versus Wycoff where it says:

> "This is dubious even though the declaratory complaint sets forth a claim of Federal right, if that right is in reality in the nature of a defense to a threatened cause of action."

Judge Orr: We had talked about giving you 30 minutes. You started out with 30 minutes. We have now given you 50. However, we have interrupted you a good deal.

Mr. Cline: I appreciate that very much. I will try to finish as quickly as I can, Your Honor.

In your consideration of the cases of Rice versus Santa Fe Elevator Corporation and Clover Leaf versus Patterson—that is, in your reconsideration of those cases, I would like to point out that in neither case was there a three judge District Court invoked, and in neither case was the issue of exhaustion of the administrative process raised.

In the case of Bethlehem Steel Corporation versus New York State Labor Relations Board, it is not authority for the three judge court to assume jurisdiction. The appeal in that case to the United States Supreme Court was from the New York Court of Appeals.

[fol. 469] We are likewise contending here that this matter should be permitted to go to the United States Supreme Court by way of an appeal from the California Supreme Court.

The case of Public Utilities Commission of Ohio versus United Fuel Gas Company may be distinguished because the administrative process in that case had been exhausted.

The matter had been pending in the Federal Courts from July 3, 1935, to December 8, 1942, over seven years at the time the argument before the United States Supreme Court, and the majority of the Court felt that such matters should be finally disposed of after such an undue length of time pending in the Federal Courts.

I have intended to quote considerably again from the case of Alabama Public Service Commission versus Southern Railway, but I am rather inclined to believe that you have fully considered that case.

Under Section 2281 the jurisdiction of this three judge court is based upon the ground of unconstitutionality of a state statute. This Court states it has not reached the issue of unconstitutionality of the state statute. The Court should at least make a finding that a substantial Federal constitutional question is involved and state clearly what that issue is. If no substantial Federal constitutional issue has been raised, that three judge court should dissolve itself.

[fol. 470] I refer you to California Water Service Company versus the city of Redding 304 U. S. 252, city of Springfield versus U. S. 99 Fed. 2nd 860 (*cercariae* denied 306 U. S. 50). In that connection we have that problem before us. In order to protect ourselves we are going to have to take an appeal not only to the United States Supreme Court but also to the Court of Appeals, because it is just possible that when this matter will get up before the United States Supreme Court they would say that the three judge court had been improperly invoked because there is no substantial Federal constitutional issue involved, that the three of you nevertheless do constitute a District Court, and for that reason our appeal should have been taken to the Court of Appeals. So you can see that the procedure with which we are confronted is even, in the Federal Courts, no simple matter.

Judge Goodman: I don't think there is any merit in that at all, counsel, because we covered that specifically.

Mr. Cline: You stated that you didn't reach the issue.

Judge Goodman: Well, if you look at the case that came up in the Supreme Court (that case of ——) ——the Supreme Court considered that question—that case from

Hawaii—Ackerman against someone—that there they considered it, because the Court itself pointed out that it was deciding the case both as a three judge court and as a District Court.

Mr. Cline: If you are deciding it as a District Court, [fol. 471] we have to go to the Court of Appeals.

Judge Goodman: We pointed out in this case, however, that we were deciding the case as a three judge court.

Mr. Cline: But our problem is, we are going to make the argument that the penalty section is not applicable to these facts. If the penalty section isn't applicable, how can there be any substantial Federal constitutional issue, when the Federal constitutional issue depends upon that penalty section? If it isn't applicable, and we say it is not, then there is no Federal constitutional question involved.

Judge Goodman: There are on grounds of jurisdiction.

Mr. Cline: Are on the grounds of jurisdiction, the other grounds, of jurisdiction, require us to go to the Court of Appeals.

Judge Goodman: The authorities sustain the viewpoint if the Court properly takes jurisdiction they may decide the case as a three judge court.

Mr. Cline: In view of the interpretation which has been given to the letters from the secretary of the Commission, we have deemed it advisable to make reference to the Johnson Act. The jurisdiction of this three judge court is based solely on repugnance of the order to the Federal Constitution; otherwise there would be no ground for jurisdiction. That being the case, it is our contention that the [fol. 472] Johnson Act will apply and that the injunction should not issue in this case because the letters of the secretary of the Commission, if they are orders, are orders affecting rates, and the Federal Courts under the circumstances set out in the Johnson Act have no authority to issue an injunction affecting orders relating to rates.

Also I again wish to state that the judgment in its form is too broad in scope and again I say there is no evidence whatsoever that the defendants are seeking to regulate any aspect of the plaintiffs' operations but their rates.

We admit that we had no authority with respect to the regulation of interstate commerce, that has been preempted by the Federal Act, and we are attempting to exercise no jurisdiction at all in that respect.

Judge Orr: These matters, have you got them covered in your memorandum?

Mr. Cline: Yes I have.

Judge Orr: The time has expired.

Mr. Cline: I just wish to cite one more case, if I may be permitted to do so.

Judge Goodman: Is it in your memorandum?

Mr. Cline: No. I am citing it because it is a matter brought up in the absence of Mr. Treadwell. It is the case of Kelly versus Washington 302 U. S. 182 Lawyers Edition 3, which states that if a state has failed to exercise [fol. 473] authority for a considerable period of years is immaterial.

Judge Orr: We are of the opinion that we don't think we will require any argument from you.

Mr. Treadwell: I hardly thought so.

Judge Orr: The matter will be submitted.

[fol. 474] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 475] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 823

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, and PETER E. MITCHELL, Members of and Collectively Constituting the Public Utilities Commission of the State of California; EVERETT C. MCKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, and J. THOMASON PHELPS, Legal Advisers of the Public Utilities Commission of the State of California, Defendants-Appellants,

vs.

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a Corporation, Plaintiffs-Appelles; Civil Aeronautics Board, Intervenor-Appellee

STATEMENT BY APPELLANTS OF POINTS RELIED ON AND DESIGNATION OF RECORD FOR PRINTING—Filed June 1, 1953

Pursuant to Rule 13 of this Court, appellants herein state that they intend to rely upon all the points designated in their Assignment of Errors and Prayer for Reversal.

Appellants herein deem the entire certified transcript of the record (including the Agreed Statement of Facts), as filed in the above-entitled cause, save and except that por-
[fol. 476] tion which consists of the exhibits (other than the Agreed Statement of Facts), necessary for the consideration of the points relied on, and appellants hereby designate the same for printing.

Dated, May 28, 1953.

Respectfully submitted, Everett C. McKeage, Chief Counsel; J. Thomason Phelps, Senior Counsel; Wilson E. Cline.

[fols. 477-481] AFFIDAVIT OF SERVICE (omitted in printing)

[fol. 482] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 823

[Title omitted]

DESIGNATION BY PLAINTIFFS-APPELLEES OF RECORD FOR PRINTING—Filed June 2, 1953

Pursuant to Rule 13 of this Court, plaintiffs-appellees herein deem the entire transcript of the record (including the Agreed Statement of Facts and the documents attached thereto and Exhibits 1, 2, 3, 4 and 5 referred to on pages 13 to 16 of the transcript) as filed in the above entitled cause, necessary for the consideration of the points relied [fol. 483] upon, and plaintiffs-appellees hereby designate the same for printing.

Dated: May 29, 1953.

Respectfully submitted, Treadwell & Laughlin, Edward F. Treadwell, Reginald S. Laughlin, Attorneys for United Air Lines, Inc., and Catalina Air Transport, Plaintiffs-Appellees.

[fols. 484-487] AFFIDAVIT OF SERVICE—(Omitted in Printing)

[fol. 488] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 823

[Title omitted]

STIPULATION AS TO CERTAIN EXHIBITS—Filed June 4, 1953

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that Exhibits

1, 2, 3, 4, and 5 referred to on pages 13 to 16 of the Reporter's Transcript filed in the above entitled action as part of the record on appeal therein are voluminous and include two large maps, and the same need not be printed [fols. 489-491] or reproduced in the transcript of record, but the same may be referred to in the briefs and on the argument of the appeal by any party, and may be submitted to this Court with the same force and effect as if printed.

Everett C. McKeage, J. Thomason Phelps, Wilson E. Cline, Attorneys for Defendants-Appellants; Edward F. Treadwell, Reginald S. Laughlin, Treadwell & Laughlin, H. Tempelton Brown, John T. Lorch, Edmund A. Stephan, Mayer, Meyer, Austrian & Platt, Attorneys for Plaintiffs-Appellees; Lloyd H. Burke, United States Attorney for Northern Dist. of California; Charles Elmer Collett, Asst. United States Attorney for Northern Dist. of California; James E. Kilday, Special Asst. to Attorney General; Emory T. Nunneley, Jr., O. D. Ozment, Robert L. Stern, Acting Solicitor General, Department of Justice, Attorneys for Intervenor-Appellee.

So Ordered by the Court. —— ——, Chief Justice.

[fol. 492] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

[Title omitted]

ORDER POSTPONING JURISDICTION—June 15, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court in this case and of the motion to dismiss or affirm is postponed to the hearing on the merits.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion below	2
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	4
The questions are substantial	9
Appendix "A"—Opinion, findings of fact, conclusions of law, judgment and order denying rehearing by the United States District Court	21
Appendix "B"—Applicable statutes	37
Appendix "C"—Correspondence	46

Table of Cases Cited

Alabama Public Service Commission v. *Southern Railway*, 341 U. S. 341, 363, 95 L. ed. 1002, 1016	13, 14
Arkansas R. R. Commission v. *Chicago, Rock Island & Pac. R. R. Co.*, 274 U. S. 597, 71 L. ed. 1224	17
Bethlehem Steel Corp. v. *N. Y. State Labor Relations Board*, 330 U. S. 767	15
Brucker v. *Fisher*, 49 F. (2d) 759	2
California Water Service Co. v. *City of Redding*, 304 U. S. 252, 82 L. ed. 1323	11
City of Springfield v. *U. S.*, 99 F. (2d) 860, 306 U. S. 650, 83 L. ed. 1049	11
Cloverleaf Co. v. *Patterson*, 315 U. S. 169	15
Endicott Johnson Corp. v. *Perkins*, 317 U. S. 501, 87 L. ed. 424	12
Federal Power Commission v. *Arkansas Power & Light Co.*, 330 U. S. 802, 91 L. ed. 1261	12
Gully v. *Interstate Natural Gas Co.*, 292 U. S. 16, 78 L. ed. 1088	2
Macauley v. *Waterman S. S. Corporation*, 327 U. S. 540, 90 L. ed. 839	12
Meyers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 82 L. ed. 638	12

Page

North Carolina v. *United States*, 325 U. S. 507, 89 L. ed. 1760 17
Palmer v. *Massachusetts*, 308 U. S. 79, 84 L. ed. 93 17
Palmetto Fire Ins. Co. v. *Conn. Gas Co.*, 292 U. S. 16, 78 L. ed. 1088 2
Petroleum Exploration, Inc. v. *Public Service Commission of Kentucky*, 304 U. S. 209, 82 L. ed. 1294 15
Public Service Commission of Utah v. *Wyckoff Company, Inc.*, 344 U. S. 237, 97 L. ed. 176 13
Public Utilities Commission of Ohio v. *United Fuel Gas Co.*, 317 U. S. 456 15
Rice v. *Santa Fe Elevator Corp.*, 331 U. S. 218 15
Rochester Telephone Corp. v. *U. S.*, 307 U. S. 125, 83 L. ed. 1147 12
Rorick v. *Board of Comm'rs of Everglades Drainage District*, 307 U. S. 208, 83 L. ed. 1242 2
Tobin v. *Banks & Rumbaugh*, 201 F. (2d) 223 12
United Air Lines v. *Public Util. Comm. of California*, 109 F. Supp. 13 16
United Air Lines, Inc., et al., 50 Cal. P. U. C. 563, 37 A. C. 633, 96 L. ed. 228 16
United Kingdom v. *Norway*, (judgment of December 18, 1951, International Court of Justice Reports, 1951, p. 116) 16
Yonkers v. *United States*, 320 U. S. 685, 88 L. Ed. ed. 400 17
Wilmington Transportation Co. v. *Railroad Commission*, 236 U. S. 151, 59 L. ed. 508 16

TABLE OF CASES CITED

California Public Utilities Code:

Sections 1701 through 1706 ..... 3, 5, 10
Section 1731 ..... 3, 11
Section 1756 ..... 3, 11, 12
Section 2107 ..... 3, 7, 10, 11

Civil Aeronautics Act, Section 1(2) 3
Section 1(10) 3
Section 1(21) 3, 5, 16, 17
Section 403 3
Section 404(a) 3
Section 404(b) 3

	Page
Constitution of California, Article XII, Section 22	3, 5, 9
Johnson Act, (28 U. S. C. 1342)	19
Rule 74 of the Rules of the Civil Aeronautics Board	11
United States Code, Title 28, Section 1253	2
Section 1331	3
Section 1337	3
Section 1342	3
Section 2101	2
Section 2201	3

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THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

NITED AIR LINES, INC., A CORPORATION; AND CATALINA AIR TRANSPORT, A CORPORATION,

Plaintiffs,

CIVIL AERONAUTICS BOARD,

Intervenor,

vs.

UBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, AND PETER E. MITCHELL, MEMBERS OF AND COLLECTIVELY CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, AND J. THOMASON PHELPS, LEGAL ADVISERS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Defendants

Before: HON. WILLIAM E. ORR, Circuit Judge; HON. UIS E. GOODMAN, District Judge; HON. EDWARD P. URPHY, District Judge.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme urt of the United States, as amended, defendants-

appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Three-Judge District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Northern District of California, Southern Division, is reported in 109 F. Supp. 13. A copy of the opinion, findings of fact, conclusions of law, judgment, and order denying motion for a new trial are attached hereto as Appendix A.

Jurisdiction

The judgment of the District Court was entered on January 28, 1953. A motion for new trial was filed February 6, 1953, and this motion was denied February 20, 1953. A petition for appeal is presented to the district court herewith, to-wit, on March 27, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Rorick* v. *Board of Com'rs. of Everglades Drainage District*, 307 U. S. 208, 83 L. Ed. 1242; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 78 L. Ed. 1088; *Palmetto Fire Insurance Co.* v. *Conn.*, 272 U. S. 295, 305, 71 L. Ed. 243, 247; *Brucker* v. *Fisher*, 49 F. 2d 759.

Question Presented

Where the Secretary of the defendant-appellant California Public Utilities Commission has by letters instructed plaintiff-appellee United Air Lines, Inc., to file tariffs covering its operations between the mainland of California and Santa Catalina Island, and where the Attorney and Chief

Counsel for said Commission has testified that, if the facts remain the same, in a formal proceeding proposed to be instituted before said Commission because of United's refusal to file such tariffs he will advise said Commission it has jurisdiction to establish rates covering such operations, are United and Catalina Air Transport, plaintiffs-appellees herein, and the Civil Aeronautics Board, intervenor-appellee, entitled (1) to a declaratory judgment issued by a Three-Judge Federal District Court that the Civil Aeronautics Board has exclusive jurisdiction over said plaintiffs-appellees in their operations over such route, and that the said Commission and its members and legal advisers, defendants-appellants herein, have no jurisdiction or power of regulation over the same, and (2) to an injunction issued by a Three-Judge District Court restraining the defendant-appellant Commission and its members, employees, agents, and attorneys from in any manner interfering with such paramount jurisdiction of the Civil Aeronautics Board or from in any way controlling or regulating said route.[1]

Statutes Involved

The first sentence of the second paragraph of Section 22 of Article XII of the California Constitution; Sections 1701 through 1706, 1731, 1756, and 2107 of the California Public Utilities Code (formerly Sections 53, 60, 61, 62, 64, 65, 66 (1st and 2nd sentences), 67 (first three sentences), and 76(a) of the California Public Utilities Act); Sections 1331, 1337, 1342, and 2201 of Title 28, United States Code (62 Stats. 930, 931, 932, and 964 as amended by 63 Stats. 105); and Section 1(2), 1(10), 1(21), 403, 404(a) and 404(b) of the Civil Aeronautics Act of 1938 (52 Stats. 977, 992, and

[1] All the points raised in the assignment of errors are also presented. The Question stated above sets forth the major issue.

993, as amended), (49 U. S. C. A. 401(2), 401(10), 401(21), 483, 484(a), and 484(b) are set forth in Appendix B hereto.

Statement

The appellee-plaintiff Catalina Air Transport (formerly Wilmington-Catalina Airline, Ltd.) is a California corporation which on October 13, 1939, obtained a certificate of public convenience and necessity from the Civil Aeronautics Authority to operate as an air carrier between the mainland of California and Santa Catalina Island.

On March 7, 1946, a contract was entered into between said Catalina Air Transport and appellee-plaintiff United Air Lines, Inc., for the operation of the line by United Air Lines, Inc. This arrangement was approved by the Civil Aeronautics Board.

None of the rates established by Catalina Air Transport or United Air Lines were ever filed with or approved by the defendant Public Utilities Commission of the State of California.

In the year 1951 there was an exchange of correspondence over the question of the jurisdiction of said Commission and the duty of United to file its tariffs with said Commission. The following letters were exchanged between representatives of United Air Lines, Inc., and the Public Utilities Commission, said letters being dated, respectively, August 6, 1951; September 10, 1951; September 20, 1951; October 11, 1951; November 6, 1951; November 30, 1951; December 5, 1951; and December 27, 1951. Copies of said letters are attached hereto as Exhibit C, and made a part hereof.

The defendant Commission now claims and asserts and from time to time in the past has claimed and asserted that the rates, fares and charges covering said operations, to the extent that such operations are not a part of in-

terstate, foreign or oversea commerce as defined (according to defendants' interpretation) in Section 1(21) of the Civil Aeronautics Act of 1938 (59 U.S.C.A. 401(21)), i.e., to the extent such operations are only between points on the mainland of California and Santa Catalina Island, are entirely under the control and regulation of said defendant Commission, and that pursuant to the first sentence of the second paragraph of Section 22 of the California Constitution and Sections 1701 through 1706 of the California Public Utilities Code said defendant Commission has jurisdiction to establish such rates, fares and charges by requiring defendants to file tariffs with the defendant Commission.

On February 27, 1952, a conference was held at which Mr. Treadwell and Mr. Laughlin, attorneys for plaintiffs, and Judge McKeage and M. Cline, attorneys for defendants, were present. Mr. Treadwell testified that at this conference the defendant Everett C. McKeage, Chief Counsel for defendant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission. The findings proposed by plaintiffs contained such a finding of fact. Defendants requested that such proposed finding be stricken on the ground that although the finding is supported by testimony of Mr. Treadwell it is not supported by the preponderance of the evidence. The statements of counsel for defendants and the testimony of Judge McKeage show that there was and is no intention on the part of the defendants to institute penalty actions against United by reason of its refusal to file tariffs covering its operations between Los Angeles-Wilmington-Long Beach and Avalon until after the jurisdictional question is finally settled and that they do not intend then to seek any penalties except those which

accrue after a contumacious refusal on the part of United to comply with a final order of the defendant Public Utilities Commission. (Reporter's Transcript of Proceedings 11/21/52, pages 30-33, 38, 45, 47-49, 61-64.)

In this connection line 22, page 61 through line 21, page 62 of the Reporter's Transcript of Proceedings on 11/21/52, reads as follows:

> "Mr. Phelps: Q. I shall just ask the Judge [witness Judge McKeage] to describe what the position of the commission, with respect to this Catalina operation, was prior to the bringing of this suit and what it is now.
>
> "Mr. Treadwell: We object to that, your Honor,
> • • •
>
> "Judge Orr: The objection is overruled.
>
> "A. [Witness Judge McKeage]. The intention—I can speak for myself, in the statutory duty that I perform, there was no intention on my part to bring penalty actions against this air carrier in connection with this Catalina operation. There was no intention on the part of the Commission to do so either. The only intention that was ever expressed was that if these rates were not filed that an order of investigation would be instituted where the question of jurisdiction would be determined in the orderly course of due process of law.
>
> "We have never changed our position. That was our intent then. That is our intent now."

Furthermore, it is a matter of record that the action was not filed by plaintiffs in the Federal District Court until June 25, 1952, almost four months after the conference of February 27, 1952. This would certainly indicate an absence of pressure on United rather than the threat of a penalty of $2,000 per day. (Reporter's Transcript of Proceedings 11/21/52, page 66.)

The Three-Judge District Court struck the following from plaintiffs' proposed findings in adopting them as their own:

> "• • • Subsequently, on February 27, 1952, the defendant Everett C. McKeage, Chief Counsel for the defendant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission."

On June 25, 1952, plaintiffs filed their complaint in the United States District Court seeking declaratory relief and an injunction against defendants. Plaintiffs' principal claim for relief is based on the allegation that defendant Commission claims and asserts that plaintiff United in failing to file its tariffs with the defendant Commission has violated Section 2107 of the Public Utilities Code and that said plaintiff has become liable for penalties in the sum of $2,000 per day for every such violation; that said defendant Commission has threatened to bring suit to recover such claimed penalties unless said tariffs on the route in question are filed with said Commission.

The Three-Judge District Court was convened because plaintiffs claim that Section 2107 of the California Public Utilities Code is in violation of the Constitution of the United States. The District Court concluded that a substantial question would have been presented as to the constitutionality of the penalty provisions, if reached, but did not reach this question.

The District Court found that the statutes of the State of California provide for penalties up to and including $2,000 for each day that operations are conducted by carriers without effective tariffs being on file with the defendant Public Utilities Commission, and that the refusal of the plaintiff United to heretofore comply with the directives of the defendant Commission to file tariffs, and any

refusal to comply with any future such directive, has subjected and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. The District Court further found that apart from these risks, United is confronted with the necessity for incurring the expenditures (in excess of $3,000) incident to defending a proceeding certain to be instituted before the defendant Commission unless this Court resolves the controversy presented.

The District Court found that Santa Catalina Island is an island located in the Pacific Ocean, and is a part of the State of California. The distance between the shorelines of the island and of the mainland of California is thirty miles.

The District Court concluded that the intervening waters between the three-mile marginal belts along the coastline of the mainland of the State of California, and surrounding Santa Catalina Island, are wholly outside the territory and jurisdiction of the State of California, and that aircraft passing over these intervening waters are passing through air space over a place outside of the State of California. The District Court further concluded that plaintiffs' operations between Santa Catalina Island and the mainland of the State of California constitute interstate air transportation as defined by the Civil Aeronautics Act of 1938, and the powers conferred upon and exercised by the Civil Aeronautics Act leave no room for State regulation of these operations.

On January 28, 1953, the Three-Judge District Court (1) entered a declaratory judgment against defendants decreeing that the Civil Aeronautics Board has exclusive jurisdiction over plaintiffs-appellees in their operations over

the route between the mainland of California and Santa Catalina Island, and that the Public Utilities Commission of the State of California and its members and legal advisers, defendants-appellants herein, have no jurisdiction or power of regulation over the same, and (2) issued an injunction permanently restraining the defendant-appellant Commission and its members, employees, agents, and attorneys from in any manner interfering with such paramount jurisdiction of the Civil Aeronautics Board or from in any way controlling or regulating said route.

The motion for new trial filed by defendants February 6, 1953, was heard February 19, 1953, and was denied February 20, 1953.

The Questions Are Substantial

The issues involved in this case are substantial and are of great importance to the defendant Commission and to the people of the State of California.

At the inception of the administrative processes of the defendant Commission the plaintiffs without exhausting their administrative remedies and their remedies in the courts of the State of California have sought and obtained from the Three-Judge District Court a declaratory judgment resolving the issues and an injunction permanently enjoining defendant Commission from in any way controlling or regulating plaintiffs' route between the mainland of California and Santa Catalina Island.

1. The District Court has erroneously found that the statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that operations are conducted by carriers without effective tariffs being on file with the defendant Public Utilities Commission. The first sentence of the second paragraph of Section 22 authorizes the defendant Commission to establish rates for

air carriers. No provision of the California Constitution nor of the Public Utilities Code requires air carriers to file tariffs with the Commission. If the injunction issued by the Federal District Court is dissolved by the United States Supreme Court the defendant Commission will institute an investigation proceeding before itself in accordance with procedures established in Sections 1701 through 1706 of the Public Utilities Code. If the Commission determines that it has jurisdiction it will proceed to establish rates covering plaintiffs' operations in question or will order plaintiffs to file tariffs of its rates covering such operations.

Only after a formal order of the Commission requiring plaintiffs to file tariffs has become final will plaintiffs be subject to the penalty provisions of Section 2107 of the Public Utilities Code by reason of refusal thereafter to file tariffs covering their operations.

2. The letters from the commission Secretary instructing plaintiff United to file its tariffs (See Exhibit C attached hereto) are not orders of the defendant Commission which will support a penalty action or a contempt proceeding for refusal to comply therewith, as they were not issued pursuant to the procedural provisions of the Public Utilities Code and do not comply with the requirements of due process.

Such letters were merely preliminary to the issuance of an order of investigation and were notice to plaintiff United that it might expect an order of investigation to be instituted as provided by the applicable law. Furthermore, a voluntary compliance by plaintiff United with the instruction to file its tariff would have obviated the necessity of the issuance of an order of investigation.

The letters from the Secretary of the Commission were the beginning of the administrative process rather than the end. The testimony of Judge McKeage quoted above under

the heading "Statement" (pages 61 and 62 of the Reporter's Transcript of the hearing on November 21, 1952) fully explain the purport of the letters and the intention of the Commission respecting the procedure to be followed in seeking to require plaintiff United to file its tariff.

No penalty action will be brought against plaintiff United because of its prior and present refusal to file with defendant Commission tariffs covering its Catalina operations, not only because the defendant Commission has no intention of instituting such a penalty action, but also because there is no legal basis for instituting any penalty action at the present time.

3. No claim or assertion of right has been made by the defendant Commission against plaintiffs under Section 2107 of the Public Utilities Code by reason of plaintiff United's failure to file tariffs covering the operations in question. Therefore, there is no substantial question concerning the validity of Section 2107 under the Federal Constitution. The Three-Judge District Court should have so found and dissolved itself.

California Water Service Co. v. *City of Redding,* 304 U. S. 252, 82 L. Ed. 1323;

City of Springfield v. *U. S.,* 99 F. 2d 860, cert. den. 306 U. S. 650, 83 L. Ed. 1049.

4. Assuming for the sake of argument that the letters from the Commission Secretary are orders issued in a complaint or investigation proceeding, in accordance with Rule 74 of the defendant Commission's Rules of Procedure such letters would become effective 20 days after service. Under Sections 1731 and 1756 of the California Public Utilities Code plaintiff United could have filed an application for rehearing within 20 days after service of the letters upon it. If the application for rehearing were denied or if the decision on rehearing were adverse, plaintiff United

could then have applied to the Supreme Court of the State of California for a writ of review. Under this theory of the case plaintiff United has failed to exhaust its administrative remedies and the orders have now become final.

Plaintiffs are bound to exhaust the administrative remedies available to them as a condition precedent to seeking judicial relief.

Federal Power Commission v. *Arkansas Power and Light Company*, 330 U. S. 802-803, 91 L. Ed. 1261-1262;

Macauley v. *Waterman S. S. Corporation*, 327 U. S. 540, 544, 90 L. Ed. 839, 842;

Endicott Johnson Corp. v. *Perkins*, 317 U. S. 501, 87 L. Ed. 424;

Rochester Telephone Corporation v. *United States*, 307 U. S. 125, 130, 83 L. Ed. 1147, 1152;

Meyers v. *Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 50-51, 82 L. Ed. 638, 644.

Tobin v. *Banks & Rumbaugh*, 201 F. 2d 223.

5. Furthermore, the District Court lacks jurisdiction of the subject matter of this case as there exists an adequate remedy in the Courts of the State of California for the purpose of reviewing any order that may be issued by the defendant Commission pertaining to the subject matter of this action. Section 1756 of the California Public Utilities Code provides for direct review of Commission orders by the California Supreme Court. State courts are bound equally with the Federal courts by the Federal Constitution and laws. Ultimate recourse may be had to the United States Supreme Court by direct appeal from a decision of a state court in favor of the validity of a state statute where its validity is questioned on the ground of its being repugnant to the Constitution, treaties or laws of the United States.

We rely on the following cases:

Public Service Commission of Utah v. *Wycoff Company, Inc.*, 344 U. S. 237, 97 L. Ed. Adv. Ops. 176;
Alabama Public Service Commission v. *Southern Railway*, 341 U. S. 363, 365-366, 95 L. Ed. 1016, 1019;
Alabama Public Service Commission v. *Southern Railway*, 341 U. S. 341, 350-351, 95 L. Ed. 1002-1009.

Defendants are making no claim under Federal law. The claim of jurisdiction to establish rates covering the operations in question is founded upon Section 22 of the Constitution of the State of California. The plaintiffs' claim under the Civil Aeronautics Act is in the nature of a defense.

We quote from the majority opinion of *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, 344 U. S. 237, 248, 97 L. Ed. Adv. Ops. 176, 183:

"• • • Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigation from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. • • •"

We also quote from *Alabama Commission* v. *Southern Railway*, 341 U. S. 341, 349, 95 L. Ed. 1002, 1009:

"* * * Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. * * *

"'This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts. * * * On the contrary, it is but a recognition * * * that a federal court of equity * * * should stay its hand in the public interest when it reasonably appears that private interests will not suffer. * * *

"'It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.'"

6. The only threat which is admitted and the only threat which exists is the expressed intention on the part of the defendant Commission to institute an investigation on its own motion if permitted to do so by the Federal Courts. The action taken by the defendant Commission to date has been preparatory to the institution of an investigation. The appearance and defense of United in such investigation will not impose irreparable injury upon United in an equitable sense.

The expense and annoyance of litigation is part of the social burden of living under government. When the only

ground for interfering with the state procedure is the cost of preparing for a hearing, there is no occasion for equitable intervention. *Petroleum Exploration, Inc.* v. *Public Service Commission of Kentucky,* 304 U. S. 209, 220-222, 82 L. Ed. 1294, 1302, 1303.

7. In reviewing the cases cited in the opinion of the Federal District Court the following aspects of these cases should be considered:

In neither *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, nor *Cloverleaf Co.* v. *Patterson,* 315 U. S. 169, was a three-judge district court invoked and in neither case was the issue of exhaustion of the administrative process raised.

The case of *Bethlehem Steel Corp.* v. *N. Y. State Labor Relations Board,* 330 U. S. 767, is not authority for this Three-Judge District Court to assume jurisdiction. The appeal in the *Bethlehem Steel Corp.* case was from the New York Court of Appeals. We are likewise contending that this matter should be permitted to proceed through the Supreme Court of the State of California.

The case of *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.,* 317 U. S. 456, may be distinguished from the case here under consideration for the following reasons: (1) In the *United Fuel Gas Co.* case the administrative process had been exhausted. (2) The *United Fuel Gas Co.* case had been pending in the Federal courts from July 3, 1935, to December 8, 1942, over seven years, at the time of the argument before the United States Supreme Court, and the majority of the court was of the opinion that the matter should be finally disposed of after such an undue length of time.

8. The rates, fares and charges for transportation by air carriers between the mainland of California and Catalina Island where the transportation over such route has not previously or subsequently passed over the territory of any

other state or country is a matter primarily of local concern to the people of the State of California. In the absence of preemption of the field of regulation by the Federal authority such rates, fares, and charges are subject to the regulatory jurisdiction of the defendant Commission.

Wilmington Transportation Co. v. *Railroad Commission*, 236 U. S. 151, 156, 59 L. Ed. 508, 517;

United Air Lines, Inc., et al. (Decision No. 45624 in Case No. 5271, rendered April 24, 1951, by the Public Utilities Commission of the State of California, 50 Cal. P. U. C. 563. Decision of Commission affirmed by California Supreme Court without opinion (37 A. C. 633) and appeal dismissed by Supreme Court of the United States without opinion (October Term 1951, U. S. No. 464, 96 L. Ed. Adv. Ops. 228).)

9. In the case of *Fisheries* case (*United Kingdom* v. *Norway*), Judgment of December 18, 1951, International Court of Justice Reports 1951, p. 116, involving a dispute between Great Britain and Norway concerning the territorial waters of the latter, it was held by the International Court of Justice that waters lying between the mainland of Norway and the chain of islands screening its western shoreline are territorial waters. The principle of this case compels the conclusion that the territory between the California coast and Catalina Island belongs to the United States and to the State of California. For internal and domestic purposes this territory is within the State of California.

The District Court has erroneously found and concluded that a substantial portion of the waters between the mainland of California and Santa Catalina Island are outside the State of California.

10. In Section 1(21)(a) of the Civil Aeronautics Act of 1938 (49 U. S. C. A. 401 (21)(a)) Congress defined "inter-

state air transportation so as to include "the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce between * * * places in the same State of the United States through air space over any place outside thereof."

One of the strongest presumptions known to the law is that Federal authority has not superseded State authority because the superseding of State authority by the Federal government strikes at that delicate balance between Federal and State jurisdictions upon which our Federal form of government is based. The superseding of State authority will be declared only where there is no possible doubt as to the clear intent of the Congress so to supersede State authority. Furthermore, it must clearly appear that the Federal invasion of State authority is necessary. Nothing must be left to inference or presumption.

Palmer v. *Massachusetts*, 308 U. S. 79, 82-85, 84 L. Ed. 93, 96-99;

Yonkers v. *United States*, 320 U. S. 685, 690-691, 88 L. Ed. 400, 403-405;

North Carolina v. *United States*, 325 U. S. 507, 511, 89 L. Ed. 1760, 1765;

Arkansas R. R. Commission v. *Chicago, Rock Island & Pac. R. R. Co.*, 274 U. S. 597, 603, 71 L. Ed. 1224, 1228.

The term "State" as used in Section 1(21)(a) of the Civil Aeronautics Act (49 U. S. C. A. 401(21)(a)) need not be limited to the territorial boundaries of a state but may reasonably include its jurisdictional boundaries. Certainly the waters between the mainland of California and Santa Catalina are within the jurisdictional boundaries of the State of California. Such being the case, the route in question is not outside of the State of California and hence does

not fall within the definition of "interstate air transportation" in the Civil Aeronautics Act.

Congress has good reason to include air transportation between points in the same state which passes through air space into another State in the definition of "interstate air transportation." Unless such transportation is regulated by the Federal authority it is subject to no regulation. On the other hand, California can regulate the rates for transportation between points in California involving passage over the high seas until this field of regulation is preempted by the Federal authority.

11. The transportation of persons or property by air carrier between the mainland of California and Santa Catalina Island is not interstate or foreign commerce in the general sense or in the Constitutional sense. Conceding for the sake of argument that it is overseas transportation in the general sense, Congress has not seen fit to include such transportation within its own definition of "overseas air transportation". The language "or between places in the same State of the United States through the air space over any place outside thereof" as used in the definition of "interstate air transportation" undoubtedly applies to transportation between places in the same state where the aircraft has gone through air space outside the jurisdiction of the state, namely through the air space over some other state.

The Federal District Court erred in failing to find and conclude that Congress through the adoption of the Civil Aeronautics Act of 1938 has not preempted the field of economic regulation of air transportation between places in the State of California when that transportation involves passage through the air space over the high seas.

12. While we contend that the letters from the Commission Secretary to plaintiff United are not enforceable or-

ders of the Commission, the Three-Judge district Court appears to have held that such letters are enforceable orders. We, therefore, wish to point out that such letters affect rates; they were sent after considering the contentions of plaintiff United; and, in our opinion, they in no way affect interstate commerce. The jurisdiction of this Three-Judge District Court is based on repugnance of the penalty provisions of the California Public Utilities Code by which the Three-Judge District Court has found the letters may be sought to be enforced by the Commission. Under the circumstances we direct attention to the provisions of the Johnson Act, Section 1342 of Title 28, U. S. Code (28 U.S.C.A. 1342) which prohibits Federal District Courts from enjoining the operation of, or compliance with, orders affecting rates.

13. The provisions of the Constitution of the State of California under which defendants claim jurisdiction over plaintiffs pertain only to rates, fares and charges. Defendants have never claimed jurisdiction over any other aspect of plaintiffs' operations. Clearly in so far as the judgment of the Three-Judge District Court restrains defendants from asserting jurisdiction over matters other than rates, fares and charges of plaintiffs, it is not supported by the record and is in error.

It is submitted that the Three-Judge District Court has acted without jurisdiction in this case and has improperly decided that Congress through the enactment of the Civil Aeronautics Act has preempted the field of regulation of rates of air carriers operating between the mainland of California and Santa Catalina Island. The issues to be decided in this case are vital in their operation on air transportation in the State of California. In many instances the routes of air carriers operating between the principal cities

in California may involve passage through air space over the high seas.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

/s/ EVERETT C. MCKEAGE
Chief Counsel

/s/ J. THOMASON PHELPS
Senior Counsel

/s/ WILSON F. CLINE
Attorneys for Defendants—Appellants
514 State Building
San Francisco 2, California

Dated March 27, 1953.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT, FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

UNITED AIR LINES, INC., a Corporation; and CATALINA AIR TRANSPORT, a Corporation, *Plaintiffs*
CIVIL AERONAUTICS BOARD, *Intervenor*

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; et al., *Defendants*

Treadwell & Laughlin,
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Reginald S. Laughlin, 955 Mills Tower, San Francisco 4, Calif.
Mayer, Meyer, Austrian & Platt.
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Chauncey Tramutolo, United States Attorney.
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O. D. Ozment, Assistant to General Counsel, Civil Aeronautics Board.
Everett C. McKeage, Chief Counsel Public Utilities Commission, 514 State Building, San Francisco, Calif.
J. Thomason Phelps, 514 State Building, San Francisco, Calif.
Attorneys for Defendants.

Before: ORR, Circuit Judge; GOODMAN, District Judge; MURPHY, District Judge.

OPINION

GOODMAN, *District Judge:*

On October 13, 1939, the Civil Aeronautics Board, pursuant to its power under the Civil Aeronautics Act (49 USC 401 et seq.), issued to the plaintiff, Catalina Air Transport, a certificate of public convenience and necessity authorizing it to engage in air transportation between Los Angeles-Wilmington-Long Beach, California, and Avalon on the island of Santa Catalina, (a part of the State of California) over the intervening high seas. Since March 7, 1946, plaintiff, United, with the approval of the Civil Aeronautics Board, has conducted air transportation over the described route and has performed the obligations of plaintiff, Catalina, under the latter's certificate of convenience and necessity. Plaintiff, Catalina, since 1939, and United, since 1946, have been subject, in all respects, including rates of transportation, to the regulations of the Civil Aeronautics Board. In September of 1951, defendant Public Utilities Commission of California advised United in writing that the Commission claimed jurisdiction over the Catalina route and therefore instructed United "to file with this Commission the tariffs covering the service in question." To this, United objected. But in December of 1951, it was again advised by the Commission in writing: "In view of our interpretation of the Civil Aeronautics Act and the California Constitution we again instruct . . . to file with this Commission the tariffs covering the service between Avalon and Long Beach." United and its predecessor, having been regulated by the Civil Aeronautics Board for twelve years as to the Avalon route, United thus found itself confronted with a sudden, belated and somewhat unexplained claim of state jurisdiction. Being fearful of the consequences besetting a victim of conflicting jurisdictions, United filed this action.

The substance of plaintiff's complaint is that the United

States, by the Civil Aeronautics Act of 1938, pre-empted the field of air commerce and transportation involved in the described route of plaintiff; that federal authority is supreme and that the attempt to exercise jurisdiction by the California Public Utilities Commission would subject the plaintiff to irreparable damage. Declaratory relief is sought. As well, it is claimed that certain parts of the Public Utilities Act of California, under which the defendant Commission is authorized to function, are in violation of the Constitution of the United States.

At the beginning of the litigation, upon request of counsel for plaintiff, pursuant to 28 USC §§ 2281, 2284, a three-judge court was appointed to hear and determine the cause. This was proper because the complaint sought to restrain enforcement of a state statute, inter alia, upon the alleged ground of its unconstitutionality. The court assembled. Heretofore it dismissed the action against defendant Brown, Attorney General of California, and granted Civil Aeronautics Board the right to intervene and allowed it to file a complaint as such intervenor. The cause has been heard upon the merits, upon the complaints of plaintiff and intervenor, and the answers of defendants to both complaints.

We do not reach nor decide the issue tendered, that the state statute is unconstitutional.[2] If the cause required the resolution of no other *federal issue*, obviously this court could dissolve itself. See Bowles v. Case, 9 Cir. 149 Fed. 2d 777; affirmed 327 U. S. 92; Ex parte Bransford, 310 U. S. 354; cf. Farmers Cin Co. v. Hayes, 54 Fed. Supp. 43.

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[2] The Supreme Court has made the frequent admonition that federal courts should refrain from invalidating statutes on constitutional grounds when there are other adequate grounds for decision:

"*Hurd* v. *Hodge*, 334 U.S. 24, 30, 68 S. Ct. 847, 92 L. Ed. 1187; *Rescue Army* v. *Municipal Court*, 1947, 331 U.S. 547 at page 569, 67 S. Ct. 1409, 91 L. Ed. 1666; *Alma Motor Co.* v. *Timkin-Detroit Axle Co.*, 1946, 329 U.S. 129, 136, 67 S. Ct. 231, 91 L. Ed. 128; *Arkansas Fuel Co.* v. *State of Louisiana ex rel. Muslow*, 1938, 304 U.S. 197, 202, 58 S. Ct. 832, 82 L. Ed. 1287; *Banker* v. *Grice*, 1898, 169 U.S. 292, 18 S. Ct. 323, 42 L. Ed. 748.

There would appear to be no good reason why this doctrine should not apply to courts constituted as this one is.

But there are other adequate bases of federal jurisdiction. 28 USC 1331; 28 USC 1337; 28 USC 2201.[3] Such being the case, this Court, having properly acquired jurisdiction, has power to consider and dispose of all questions involved in the suit. Louisville & Nashville Railroad Co. v. Garrett, 231 U. S. 298; Fireman's Ins. Co. v. Beha D. C. 30 Fed. 2d 539; Fisher v. Brucker D. C. Fed. 2d 774.

The Civil Aeronautics Act of 1938 defines interstate air transportation to mean "The carriage by aircraft of persons or property . . . between places in the same state of the United States through the air space over any place outside thereof."

The record here shows, by stipulation, that there is a distance of about 30 miles between the shore line of the United States and the Santa Catalina Island. We have no difficulty in finding, and so find, that a substantial portion of those 30 miles lies over the high seas and is not within the State of California. Hence it follows that air transportation through the air space thereover is over a place outside of the State of California.

The Congress, by the statute, assumed jurisdiction over this area. This it had the power to do. In this field it has supremacy. Since the Congress had the power to assert federal jurisdiction, the plain language of the statute compels the conclusion that the Public Utilities Commission of the State of California has no jurisdiction or power to regulate in any manner the transportation activities of the plaintiff over the route in question.

Defendants urge that we should decline jurisdiction here in order to allow the state courts to finally adjudicate whether defendant Commission has jurisdiction. They cite the now-oft-quoted case of Alabama Public Service Commission v. Southern Railway Co., 341 U. S. 341. But that case had to do with alleged constitutional improprieties in the enforcement of a state statute, which the Supreme Court said, federal courts should leave to the decision of state courts. Here the Court must appraise the reach of a fed-

[3] § 1337 gives jurisdiction irrespective of the amount in controversy. Even so, the evidence does sufficiently establish an amount in controversy in excess of $3000.

eral statute when in conflict with state law. In that field it should assert and not forego its jurisdiction. Rice v. Santa Fe Elevator Corp., 331 U. S. 218. See also Cloverleaf Co. v. Patterson, 315 U. S. 169.

It is contended by the defendant Commission that the cause is not ripe enough for equitable relief. It admits that it has, in writing, claimed jurisdiction, but alleges that until the defendant Commission actually holds a hearing and formally seeks to embrace plaintiff, this action is premature. Upon the record here, we hold this contention to be without merit. Bethlehem Steel Corp. v. N. Y. State Labor Relations Board, 330 U. S. 767; Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U. S. 456; Penn. v. W. Va., 262 U. S. 553.

Plaintiff is entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiff in its operations in the described route and permanently forbidding and enjoining the defendants from, in any manner, interfering with such paramount jurisdiction.

Present findings and decree accordingly.

Dated: December 3, 1952.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

UNITED AIR LINES, INC., a Corporation; and CATALINA AIR TRANSPORT, a Corporation, *Plaintiffs*,

CIVIL AERONAUTICS BOARD, *Intervenor*,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, and PETER E. MITCHELL, Members of and Collectively Constituting the Public Utilities Commission of the State of California; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, and J. THOMASON PHELPS, Legal Advisers of the Public Utilities Commission of the State of California, *Defendant*

Before: Hon. WILLIAM E. ORR, Circuit Judge, Hon. LOUIS E. GOODMAN, District Judge, Hon. EDWARD P. MURPHY, District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

From the pleadings and evidence in the above-entitled action, the Court finds:

1. The plaintiff Catalina Air Transport is, and at all times mentioned herein was, a corporation organized and incorporated under the laws of the State of California.

2. The plaintiff United Air Lines, Inc., is, and at all times mentioned herein was, a corporation organized and incorporated under the laws of the State of Delaware and is and was a citizen resident of the State of Delaware.

3. The defendant Public Utilities Commission of the State of California is a regulatory Commission of the State of California; and the defendants Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, and

Peter E. Mitchell, are members of said Commission and collectively constitute said Commission, and are citizens and residents of the State of California, and have and maintain the principal office of the Commission within the State of California and the district of this Court. The defendants Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps are legal advisers of the said Public Utilities Commission, are citizens and residents of the State of California, and maintain their offices within the said principal office of the Public Utilities Commission.

4. The intervenor Civil Aeronautics Board is an agency of the United States created by and charged with responsibility for, among other things, the administration and enforcement of the economic regulatory provisions of the Civil Aeronautics Act of 1938 (52 Stat. 973, 49 U.S.C. 401 *et seq.*). That Act empowers the Board to issue certificates of public convenience and necessity authorizing air carriers to engage in interstate air transportation (49 U.S.C. 401(2), 401(21), 481). Interstate air transportation is defined by the Civil Aeronautics Act to include "the carriage by aircraft of persons or property as a common carrier for compensation or hire—in commerce between—places in the same State of the United States through the air space over any place outside thereof" (49 U.S.C. 401(21)(a)). Tariffs for such interstate air transportation must be filed with the Board and observed by the carrier (49 U.S.C. 483), and rates and practices in interstate air transportation may be prescribed by the Board (49 U.S.C. 484, 491, 642). Service may not be suspended or terminated except by leave of the Board (49 U.S.C. 481(k)), and contracts between air carriers relating to interstate air transportation, including contracts whereby one carrier conducts operations on behalf of another, must be filed with the Board for its approval or disapproval (49 U.S.C. 488, 492).

5. Santa Catalina Island is an island located in the Pacific Ocean, and is a part of the State of California. The distance between the shorelines of the island and of the mainland of California is thirty miles.

6. On October 13, 1939, the Civil Aeronautics Authority, now known as the Civil Aeronautics Board, issued a certifi-

cate of public convenience and necessity to Wilmington-Catalina Airline, Ltd., the predecessor of the plaintiff Catalina Air Transport, authorizing the air transportation of persons and property between Wilmington, on the mainland of California, and Avalon, on Santa Catalina Island, California. This award was based upon findings that the boundaries of California did not extend beyond a distance of three miles from the shoreline of the mainland, and beyond a distance of three miles from the shoreline of Santa Catalina Island. Since aircraft flying between Avalon and Wilmington were required to fly over approximately 24 miles of water not within the boundaries of the State of California, the Board concluded that common carrier transportation by aircraft between these points constituted interstate air transportation as defined by the Civil Aeronautics Act. *Wilmington-Catalina Air, Grandfather certificate,* 1 Civil Aeronautics Authority Reports 431.

7. On July 22, 1941, the Civil Aeronautics Board extended the route of Wilmington-Catalina Airline, Ltd. to Los Angeles, California, so that the carrier was then authorized to conduct operations between Los Angeles and Avalon, Santa Catalina Island, via the intermediate point Wilmington-Long Beach, California. At the same time, the Board reissued the certificate in its entirety to reflect the change of the carrier's name from Wilmington-Catalina Airline, Ltd., to Catalina Air Transport. *Catalina Air, Service to Catalina Island,* 2 Civil Aeronautics Board Reports 798. Such amended certificate has ever since continued in full force and effect.

8. Operations continuously were conducted by Wilmington-Catalina Airlines, Ltd. and by Catalina Air Transport over the routes hereinbefore described in accordance with and pursuant to the certificates of public convenience and necessity issued by the Civil Aeronautics Board, from October 13, 1939 until the carrier's equipment was requisitioned by the United States Government for military purposes in 1942. On July 23, 1942, the Board authorized the carrier to suspend operations because of the mentioned equipment requisition. This authorized suspension of service continued for the duration of the war and thereafter until

operations over the route were begun by the plaintiff United Air Lines, Inc. Tariffs for the carriage of persons and property were maintained on file with the Civil Aeronautics Board, and not with the defendant Public Utilities Commission, during all periods of operation by Wilmington-Catalina Airlines, Ltd. and its successor Catalina Air Transport; and operations were otherwise conducted under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board. All such operations constituted common carriage by aircraft for compensation and hire.

9. On June 3, 1946, the Civil Aeronautics Board approved an operating contract between the plaintiff United Air Lines, Inc. and Catalina Air Transport, dated March 7, 1946, whereby it was agreed that United would perform and discharge all of the obligations of Catalina Air Transport under its certificate of public convenience and necessity. United Air Lines, Operation of Catalina Air Transport, 6 Civil Aeronautics Board Reports 1041. Various supplemental agreements relating to the rates and fares to be charged to the public for the transportation provided by United subsequently were filed with and approved by the Board, together with various other agreements relating to miscellaneous details of the operation. Said operating contract, and the approval thereof by the Board, have been continuously in effect since the date of initial approval by the Board, and operations have been and are being conducted by United thereunder. Tariffs for the carriage of persons and property have been, and are, maintained on file by United with the Civil Aeronautics Board, and not with the defendant Public Utilities Commission, and operations have been, and are being, otherwise conducted by United under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board. All such operations constituted, and constitute, common carriage by aircraft for compensation and hire.

10. On September 20, 1951, the defendant Public Utilities Commission advised United by letter that the Commission had jurisdiction as to the rates and charges for the operation in question, and directed United to file its tariffs therefor with the Commission. United objected, asserting that

its operations were subject only to the control and jurisdiction of the Civil Aeronautics Board. Thereafter, on December 27, 1951, the Commission again advised United by letter that the Commission had jurisdiction over the Santa Catalina operations, and again directed United to file its tariffs with the Commission. *[Subsequently, on February 27, 1952, the defendant Everett C. McKeage, Chief Counsel for the defendant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission.]

11. The defendants by their answers to the complaints herein and by their testimony disclaim any present intention to institute proceedings against United for the recovery of the said penalties unless and until such time as the Public Utilities Commission formally finds and declares that it has jurisdiction over the operations in issue in a proceeding instituted before the Commission for the purpose of ascertaining jurisdiction, to which proceeding the plaintiff air carriers will be made parties, and then only if United thereafter fails to file its tariffs with the Commission after having been formally ordered to do so. The defendants state that they will cause such a proceeding to be instituted before the Commission unless this Court resolves the jurisdictional dispute between the parties. The prior assertions of jurisdiction were made by the Commission pursuant to the advice and recommendation of the Chief Counsel for the Commission, the defendant Everett C. McKeage, and he states that he will again advise the Commission in the proceeding which will be instituted by the Commission that the Commission has and should assert jurisdiction over the operations here involved with respect to tariffs, rates and charges. The plaintiff carriers will incur expenses in excess of $3,000 in defending any such proceeding before the defendant Commission.

12. Statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that operations are conducted by carriers without effective

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* Struck out in copy.

tariffs being on file with the defendant Public Utilities Commission. The defendants in the past have asserted that these statutory penalties are applicable to air carriers, and have caused proceedings to be instituted in the California Courts for the recovery of these penalties against various air carriers, including the defendant United, in other cases wherein disputes have existed concerning the regulatory jurisdiction of the defendant Public Utilities Commission.

13. The refusal of the plaintiff United to heretofore comply with the directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. Apart from these risks, United is confronted with the necessity for incurring the expenditures incident to defending a proceeding certain to be instituted before the defendant Commission unless this Court resolves the controversy presented. No provisions exist under which United may recover its expenditures from the defendants, and these certain and possible expenditures may ultimately be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United.

14. The Court has not in these findings made any findings as to the constitutionality of the Acts of the Legislature of the State of California imposing penalities referred to in the complaint, or the question as to whether such Acts are applicable to the plaintiffs as air carriers, for the reason that the same involve the constitutionality of state laws and a decision on said questions is not necessary to final determination of this controversy.

Conclusions of Law

Upon the basis of the foregoing findings, the Court concludes:

1. This Court has jurisdiction under 28 U.S.C. 1331 in that the amount in controversy exceeds $3,000, exclusive of

interest and costs, and the case arises under the Constitution (Article 1, Section 8) and laws of the United States (Civil Aeronautics Act of 1938, 49 U.S.C. 401, et seq.); under 28 U.S.C. 1337 in that the case arises under an Act of Congress regulating commerce (Civil Aeronautics Act of 1938, 49 U.S.C. 401 et seq.); and under 28 U.S.C. 2201 in that an actual controversy exists between the parties concerning the question of whether the plaintiff air carriers are to be regulated by the Public Utilities Commission of the State of California or by the Civil Aeronautics Board.

2. The Civil Aeronautics Board is entitled to seek and obtain a ruling as to its powers and jurisdiction as a plaintiff-intervenor in this case, and to obtain declaratory and injunctive relief against any interference by the defendants with its jurisdiction.

3. The complaint herein seeks, *inter alia*, to restrain the enforcement of a statute of the State of California upon the grounds that certain penalties provided therein which may be applicable to air carriers are so unreasonable and oppressive as to be in violation of the Fourteenth Amendment to the Constitution of the United States. A substantial question would have been presented as to the constitutionality of these penalty provisions, if reached, and the appointment of a three-judge Court pursuant to 28 U.S.C. 2281 and 2284 was appropriate and required for the purpose of enabling the Court to resolve all issues presented by the air carrier plaintiffs. Having properly acquired jurisdiction, this statutory three-judge Court has jurisdiction to consider and dispose of this case even though its disposition is on grounds other than those relating to the constitutional issue which necessitated the assembling of the Court.

4. The proceeding before the defendant Public Utilities Commission which the defendants, unless precluded by action of this Court, intend to institute against the plaintiff air carriers will subject said air carriers, and possibly the public, to irreparable injury if the said Commission has no jurisdiction in the premises, and would constitute a burden on interstate commerce and an interference with the jurisdiction of the Civil Aeronautics Board. These factors, coupled with the risks and expenditures to which the plain-

tiffs may be subjected as a result of possible penalty actions, and the actual controversy which exists between the parties, are such as to entitle both the plaintiffs and the intervenor to declaratory relief, and injunctive relief against actions which the defendants might otherwise institute concerning a subject matter over which the defendant Commission and the State of California are hereinafter found to lack jurisdiction. Plaintiffs have no plain, speedy and efficient remedy in the Courts of the State of California, or otherwise, than by this action. Further, since the matter in issue concerns the reach of a Federal statute which conflicts with the claims of the defendants regarding state law, this Court should decide the issues tendered irrespective of the existence or adequacy of any state Court remedies.

5. Without reaching or considering the status of the waters of the three-mile marginal belts along the coastline of the mainland of the State of California, and surrounding Santa Catalina Island, as territorial waters of the State of California for regulatory purposes, we conclude and hold that the intervening waters between these marginal belts are wholly outside the territory and jurisdiction of the State of California, and that aircraft passing over these intervening waters are passing through air space over a place outside of the State of California.

6. Congress has power to regulate all phases of transportation between places in the same State when that transportation involves passage through or over territory or waters outside the State, and it has asserted that power in the field of air transportation through the adoption of the Civil Aeronautics Act of 1938, and by declaring therein that all such common carrier transportation by aircraft constitutes interstate air transportation. The Civil Aeronautics Act provides for complete and detailed regulation by the Civil Aeronautics Board over all phases of interstate air transportation, including rates and charges therefor, and the Board has regulated and is regulating all phases of plaintiffs' operations between Santa Catalina Island and the mainland of the State of California. Such operations by the plaintiff air carriers constitute interstate air transportation as defined by the said Act, and the powers con-

ferred upon and exercised by the Board leave no room for State regulation of these operations.

7. The plaintiffs and the intervenors are entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the plaintiffs in their mentioned operations, and permanently forbidding and enjoining the defendants from, in any manner, interfering with such exclusive jurisdiction.

Dated this 27th day of January, 1953.

(S.) WM. T. ORR,
Circuit Judge.

(S.) LOUIS GOODMAN,
District Judge.

(S.) EDWARD P. MURPHY,
District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a corporation, *Plaintiffs,*

CIVIL AERONAUTICS BOARD, *Intervenor,*

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, and PETER E. MITCHELL, Members of and Collectively Constituting the Public Utilities Commission of the State of California; EVERETT C. MCKRAGE, WILSON E. CLINE, RODERICK B. CASSIDY, and J. THOMASON PHELPS, Legal Advisors of the Public Utilities Commission of the State of California, *Defendants*

Before: HON. WILLIAM E. ORR, *Circuit Judge;* HON. LOUIS E. GOODMAN, *District Judge;* HON. EDWARD P. MURPHY, *District Judge.*

JUDGMENT

In the above-entitled action the defendants Public Utilities Commission of the State of California, Richard E. Mittelstaedt, Justus F. Craemer, Harold P. Huls, Kenneth Potter, Peter E. Mitchell, Everett C. McKeage, Wilson E. Cline, Roderick B. Cassidy, and J. Thomason Phelps, appeared and answered by their attorneys, Hon. Everett C. McKeage, Chief Counsel, and Mr. J. Thomason Phelps; the Civil Aeronautics Board, by leave of the court duly had and obtained, appeared and filed a complaint in intervention by their attorneys, Messrs. Chauncey Tramutolo, United States Attorney, Charles Elmer Collett, Assistant United States Attorney, James E. Kilday, Special Assistant to the Attorney General, Emory T. Nunneley, Jr., General Counsel, and O. D. Ozment, Assistant to General Counsel, and said defendants answered said complaint in intervention. At the inception of said case the plaintiffs properly requested the submission thereof to a three-judge court, pursuant to the provisions of 28 USC Secs. 2281, 2284, for the reason that said action raised the question of the unconstitutionality, under the Fourteenth Amendment to the Constitution of the United States, of the acts of the Legislature of the State of California imposing penalties referred to in the complaint, and such a court was assembled, consisting of Hon. William E. Orr, Circuit Judge, Hon. Louis E. Goodman, District Judge, and Hon. Edward F. Murphy, District Judge. The cause came on regularly for trial on the 21st day of November, 1952, and evidence, both oral and documentary, was introduced, and said matter was argued by the parties and submitted to the court, and the court, being now fully advised in the premises and having filed herein its findings of fact and conclusions of law,

Now, therefore, by reason of the law and the findings aforesaid, it is by the court here ordered, adjudged, and decreed:

1. That the Civil Aeronautics Board has exclusive jurisdiction over the plaintiffs in their operations over the route described in the complaint, and the defendants have no jurisdiction or power of regulation over the same;

2. That the defendants and their employees, agents and attorneys, and all persons claiming by, through or under them, be and they hereby are permanently prohibited and enjoined from in any manner interfering with such paramount jurisdiction of the Civil Aeronautics Board, or from in any way controlling or regulating said route;

3. The court has not by this decree passed upon or adjudged the constitutionality or validity of any Acts of the Legislature of the State of California imposing penalties, nor has it passed upon the question as to whether air lines such as plaintiffs' come within the purview of said Acts, and this judgment is without prejudice to any right of the plaintiffs or the intervenor with regard thereto. The reason that the court has not passed on such questions is the policy of the court not to pass upon the constitutionality or construction of state statutes, the constitutionality or construction of which has not been passed upon by the courts of the state, where the same is not necessary to a determination of the controversy before the court, and the court finds that a decision on those questions is not necessary to the determination of the controversy here involved.

Dated this 27th day of December, 1952.

(S.) WM. E. ORR,
Circuit Judge;

(S.) LOUIS GOODMAN,
District Judge;

(S.) EDWARD P. MURPHY,
District Judge.

Entered in Civil Docket January 28, 1953.

N THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 31638

UNITED AIR LINES, INC., et al., *Plaintiffs*,

CIVIL AERONAUTICS BOARD, *Intervenor*,

vs.

UBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, et al., *Defendants*

ORDER DENYING MOTION FOR A NEW TRIAL

Defendants' motion for a new trial herein was argued nd submitted. Upon the argument and in the briefs sub-itted, counsel for defendants cited the case of Public Serv-e Commission of Utah v. Wycoff Company, 344 U. S. 237, ecided December 22, 1952. We find the cited case to be lainly distinguishable here. The motion for a new trial denied.

Dated: February 20, 1953.

WM. E. ORR,
United States Circuit Judge;
E. P. MURPHY,
United States District Judge;
LOUIS E. GOODMAN,
United States District Judge.

Original filed Feb. 20, 1953, with Clerk, U. S. Dist. Court, an Francisco.

APPENDIX B

The first sentence of the second paragraph of Section 22 Article XII of the California Constitution:

Sec. 22. • • •

"Said commission shall have the power to establish rates of charges for the transportation of passengers

and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff or rates, established by said commission than the rates, fares and charges which are specified in such tariff. * * *"

Sections 1701 through 1706, 1731, 1756, and 2107 of the California Public Utilities Code:

"1701. All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

"1702. Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or-

prospective consumers or purchasers of such gas, electricity, water, or telephone service.

"1703. All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties. In any review by the courts of orders or decisions of the commission the same rule shall apply with regard to the joinder of causes and parties as herein provided. The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.

"1704. Upon the filing of a complaint, the commission shall cause copy thereof to be served upon the corporation or person complained of. Service in all hearing, investigations, and proceedings pending before the commission may be made upon any person upon whom a summons may be served in accordance with the provisions of the Code of Civil Procedure, and may be made personally or by mailing in a sealed envelope, registered, with postage prepaid. The commission shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice thereof, not less than 10 days before the time set for such hearing, unless the commission finds that public necessity requires that such hearing be held at an earlier date.

"1705. At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own

force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order.

"1706. A complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review an order or decision of the commission, a transcript of such testimony, together with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission, but if the petitioner and the commission stipulate that certain questions alone and a specified portion only of the evidence shall be certified to the Supreme Court for its judgment, such stipulation and the questions and the evidence therein specified shall constitute the record on review."

"1731. After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the commission for a rehearing."

"1756. Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued."

"2107. Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense."

Sections 1331, 1337, 1342, and 2201 of Title 28, United ates Code:

"1331. The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

"1337. The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

"1342. The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and

made by a State administrative agency or a rate-making body of a State political subdivision, where:

"(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

"(2) The order does not interfere with interstate commerce; and,

"(3) The order has been made after reasonable notice and hearing; and,

"(4) A plain, speedy and efficient remedy may be had in the courts of such State."

"2201. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. As amended May 24, 1949, c. 139, Section 111, 63 Stat. 105."

Sections 1(2), 1(10), 1(21), 403, 404(a), and 404(b) of the Civil Aeronautics Act of 1938. (49 U. S. C. A. 401(2), 401(10), 401(21), 483, 484(a) and 484(b)):

"401(2). 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be ... the public interest."

"401(10). 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

"401(21). 'Interstate air transportation', 'overseas air transportation', and 'foreign air transportation', respectively, means the carriage by aircraft of persons

or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

"(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

"(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

"(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

"483(a). Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also

state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

"(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein. Nothing in this chapter shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees and their immediate families; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulation prescribe.

"(c) No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this

section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Board may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

"(d) Every air carrier or foreign air carrier shall keep currently on file with the Board, if the Board so requires, the established divisions of all joint rates, fares, and charges for air transportation in which such air carrier or foreign air carrier participates. June 23, 1938, c. 601, Title IV, § 403, 52 Stat. 992; 1940 Reorg. Plan No. IV, § 7, eff. June 30, 1940, 5 F. R. 2424, 54 Stat. 1235."

"484(a). It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

"(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any un-

due or unreasonable prejudice or disadvantage in any respect whatsoever."

EXHIBIT C

Copy

Commissioners: Richard E. Mittelstaedt, President; Justus F. Craemer, Harold P. Huls, Kenneth Potter, Peter E. Mitchell.

PUBLIC UTILITIES COMMISSION

State of California

August 6, 1951

File No. 360-1

Address All Communications to the Commission — California State Building San Francisco 2, Calif.

Mr. W. Delaney Dilworth
Traffic Manager
United Air Lines, Inc.
5959 South Cicero Avenue
Chicago 38, Illinois

Dear Mr. Dilworth:

We understand that the United Air Lines, Inc., is providing passenger transportation service by air for the public generally between Long Beach and Avalon, Santa Catalina Island.

A review of our official files fails to indicate that the United Air Lines have a tariff on file with this Commission which sets forth the fares, rules and charges applicable to the aforementioned California intrastate traffic.

It is requested that you inform this office as to what action United Air Lines contemplates taking in this matter.

Yours very truly,

(Sgd.) WARREN K. BROWN,
Director of Transportation.

Letterhead of

UNITED AIR LINES

September 10, 1951

Mr. Warren K. Brown
Director of Transportation
Public Utilities Commission of
the State of California
California State Building
San Francisco 2, California

Re: Your File No. 360-1.

Dear Mr. Brown:

Thank you for your kind consideration in sending to me a copy of your letter of August 6, 1951.

With particular reference to that letter, United Air Lines, Inc. is providing air transportation for the carriage of persons and property between Los Angeles and Avalon and also between Long Beach and Avalon, in both directions.

We have on file with the Civil Aeronautics Board our tariffs covering the fares, rates and charges applicable to this service. Inasmuch as the Public Utilities Commission of the State of California does not have jurisdiction over the regulation of this service, we have not filed a tariff with your Commission.

Very truly yours,

W. DELANEY DILWORTH,
Traffic Manager.

pss:ab

cc: John T. Lorch, Esq.
Oscar A. Trippett, Esq.
Charles Stearns, Esq.
Paul Hebard—EXORD

PUBLIC UTILITIES COMMISSION

State of California

September 20, 1951

File No. 360-1

Address All Communications to the Commission

California State Building
San Francisco 2, Calif.

Mr. W. Delaney Dilworth
Traffic Manager
United Air Lines, Inc.
5959 South Cicero Avenue
Chicago, Illinois

Dear Mr. Dillworth:

It has been brought to the attention of this Commission that United Air Lines is performing air transportation between Los Angeles, California, and Avalon, on Santa Catalina Island, and also between Long Beach, California, and Avalon, without having filed with this Commission its tariffs covering such transportation. It is our understanding that this operation is intrastate.

In your letter of September 10, 1951, to Mr. Brown, Director of Transportation of this Commission, you take the position that the Public Utilities Commission of California does not have jurisdiction over the service in question.

This is to inform you that this Commission does have jurisdiction over the service in question, it being intrastate, and the Supreme Court of this State has held that such service is subject to the jurisdiction of this Commission. Therefore, you are instructed to file with this Commission the tariffs covering the service in question.

Very truly yours,

(Sgd.) R. J. PAJALICH,
Secretary.

Letterhead of
UNITED AIR LINES

October 11, 1951

Mr. R. J. Pajalich, Secretary
Public Utilities Commission of
the State of California
California State Building
San Francisco 2, California

Subject: Letter of September 20, 1951
File No. 360-1

Dear Mr. Pajalich:

The matter of filing a tariff for our Catalina service with the Public Utilities Commission for the State of California was referred to our Law Department for their review. We have just been advised that their opinion will be available this week, and we plan to communicate with you as quickly as it is received.

Very truly yours,

W. DELANEY DILWORTH
Traffic Manager

LGB:hk

PUBLIC UTILITIES COMMISSION

State of California

November 6, 1951

File No. 360-1

Address All Communications to the Commission — California State Building, San Francisco 2, California

Mr. W. Delaney Dilworth
Traffic Manager
United Air Lines, Inc.
5959 South Cicero Avenue
Chicago 38, Illinois

Dear Mr. Dilworth:

This refers to our exchange of letters regarding the filing of a tariff covering your service to Santa Catalina Island.

Under date of October 11 you wrote us to the effect that the opinion of your law department in this matter would be available that week and you would communicate with us when it was received.

Can you now inform us what position you propose taking in this matter?

Yours very truly,

(Sgd.) WARREN K. BROWN,
Director of Transportation

November 30, 1951

Mr. Warren K. Brown
Director of Transportation
Public Utilities Commission
State of California
California State Building
San Francisco 2, California

Re: File No. 360-1

Dear Mr. Brown:

This will acknowledge receipt of your letter of November 6, 1951, regarding our service to Santa Catalina Island.

This matter is now in the hands of our local counsel in Los Angeles and you will hear from them within the next few days.

Yours very truly,

W. D. DILWORTH
Traffic Manager

THD:ru

TRIPPET, NEWCOMER, YOAKUM & THOMAS
Lawyers

458 South Spring Street
Los Angeles 13

5 December 1951

AIR MAIL

WILSON E. CLINE, ESQ.
Assistant Counsel
Public Utilities Commission
State of California
California State Building
San Francisco 2, California

Re: File No. 360-1
(United Air Lines, Inc.)

Dear Mr. Cline:

You probably are aware of the fact that rather extended correspondence has been exchanged between the Public Utilities Commission and United with respect to that carrier's operation between Santa Catalina Island and the Los Angeles area. Such correspondence has been handled by Messrs. Brown and Pajalich on behalf of the Commission, and personnel in United's general office in Chicago. The question involved is whether or not United is required to file with your Commission tariffs covering the Catalina operation.

The matter has now been referred to us by our client for further handling, and since it concerns a question of law, it seemed appropriate to me that I should address this communication to you.

It is our position, of course, that United is not subject to the jurisdiction of your Commission with respect to transportation furnished by it between Catalina and the mainland, for all of the reasons which we have heretofore advanced in connection with the Los Angeles-San Francisco air coach fare matter now on appeal to the Supreme Court of the United States. There is present in the Catalina situation an additional factor which, in our opinion, serves to remove

any possible doubt with respect to the question. This is the fact that, while the termini of the route; i. e., Avalon and Long Beach-Los Angeles, are within the State of California, all but a small portion of the route traverses the high seas, an area which lies without the boundaries of the State of California (California Constitution Article XXI). Under such circumstance, the express language of the Civil Aeronautics Act establishes the fact of exclusive federal occupancy of the field of regulation (49 U.S.C. 401 (10), (20) and (21)). Ipso facto, this precludes the exercise of control by the state.

I trust that you will agree with the position taken by us, so that the problem may thereby be disposed of. In any event, I shall be pleased to hear from you on the matter.

Yours very truly,

of TRIPPET, NEWCOMER, YOAKUM & THOMAS

CS/rg

(Seal)

PUBLIC UTILITIES COMMISSION

State of California

File No. 360-1

Address All Communications to the Commission

California State Building,
San Francisco 2, Calif.,
December 27, 1951.

Mr. Charles Stearns, Esq.,
Trippet, Newcomer, Yoakum & Thomas,
458 South Spring Street,
Los Angeles, California.

Re: File No. 360-1

(United Air Lines, Inc.)

DEAR MR. STEARNS:

Your letter of December 5 to Mr. Cline has been referred to this office for reply.

You, of course, are fully aware of the position which has been taken by the Commission with respect to intrastate fares of air carriers operating within the State of California, which position is now supported by decisions of the California Supreme Court.

You now contend that the route between Avalon and Long Beach-Los Angeles traverses the high seas and that state regulation is precluded by reason of the claimed exclusive Federal occupancy of this field of regulation. We have given the sections of the Civil Aeronautics Act to which you have referred us careful consideration. 49 U. S. C. 401(20) is not applicable as it relates to "air commerce". We interpret 49 U. S. C. 401(21) to define "interstate air transportation", "overseas air transportation", and "foreign air transportation" separately and not jointly.

Interstate air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in any state of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or *between places in the same State of the United States through the air space over any place outside thereof;* or between places in the same Territory or possession of the United States, or the District of Columbia.

Overseas air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States.

Foreign air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

The transportation of persons or property by air carrier between Avalon and Long Beach-Los Angeles is not inter-

state or foreign commerce in the general sense or in the Constitutional sense. See *Wilmington Transportation Company* v. *Railroad Commission* (1913), 166 Cal. 741, affirmed (1915), 263 [236] U. S. 151, 56 [59] L. Ed. 508. Conceding for the sake of argument that such transportation is overseas transportation in the general sense, Congress has not seen fit to include such transportation within its own definition of "overseas air transportation." The language "or between places in the same State of the United States through the air space over any place outside thereof" as used in the definition of "interstate air transportation" undoubtedly applies to transportation between places in the same state where the aircraft has gone through the air space over some other state. Hence the Congress has not occupied the field in so far as the local transportation by aircraft between Avalon and Long Beach-Los Angeles is concerned, and such transportation remains subject to regulation pursuant to the applicable provisions of the California Constitution.

In view of our interpretation of the Civil Aeronautics Act and the California Constitution we again instruct your client United Air Lines, Inc., to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles.

Very truly yours,

(S.) R. J. PAJALICH,
Secretary.

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Office - Supreme Court, U. S.
FILED
MAY 22 1953
HAROLD B. WILLEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952 1953

No. 823-87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, and PETER E. MITCHELL, Members of and Collectively Constituting the Public Utilities Commission of the State of California; EVERETT C. MCKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, and J. THOMASON PHELPS, Legal Advisers of the Public Utilities Commission of the State of California,

Defendants-Appellants,

vs.

UNITED AIR LINES, INC., a corporation; and CATALINA AIR TRANSPORT, a corporation,

Plaintiffs-Appellees,

CIVIL AERONAUTICS BOARD,

Intervenor-Appellee.

BRIEF OF APPELLANTS UNDER RULE 12(3) IN OPPOSITION TO PLAINTIFFS-APPELLEES' STATEMENT AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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Subject Index

Page

Preliminary statement 2

I.

No case or controversy exists between Appellees and Appellants which entitles Appellees to the equitable relief granted by the Federal District Court. Until the administrative processes of Appellant Commission are exhausted the Federal District Court has no jurisdiction 2

A. No provision of the laws of the State of California imposes penalties upon United by reason of its refusal to file with Appellant Commission tariffs of the rates covering its Catalina operations prior to the issuance of an order by Appellant Commission pursuant to the procedural provisions of the California Public Utilities Code 2

B. The letters from the Secretary of the Commission instructing United to file its tariffs were not issued pursuant to the procedural provisions of the Public Utilities Code and are not orders of the Appellant Commission which may be enforced by contempt proceedings or penalty actions brought pursuant to Section 2107 of the California Public Utilities Code 4

C. Appellants have made no threat to institute penalty actions against United by reason of its refusal to file tariffs of its rates covering its Catalina operations.... 6

D. As no substantial question concerning the validity of a State statute (i.e., Section 2107 of the California Public Utilities Code) under the Federal Constitution is in issue, the Three-Judge Federal District Court had no jurisdiction under Section 2281 of Title 28, United States Code, and should have dissolved itself..... 9

E. The institution of an investigation before Appellant Commission to determine whether Appellant Commission should establish rates for the transportation in question pursuant to Section 22 of Article XII of the California Constitution will not subject Appellees to irreparable injury in an equitable sense even though Appellee air carriers may expend sums in excess of $3,000 in responding to such investigation 9

Page

F. There is no evidence in the record and consequently no finding that Appellant Commission will establish rates for Appellee United covering the operations in question different than the rates already established in its tariffs on file with the Civil Aeronautics Board. Consequently, Appellees' concern regarding Federal penalties is premature 12

G. This Court's recent decision in *Public Service Commission of Utah v. Wycoff* supports Appellants' contention that exhaustion of the administrative process before Appellant Commission is a condition precedent to the exercise of jurisdiction by the Federal District Court 12

II.

As an adequate remedy exists in the courts of the State of California for the purpose of reviewing any order issued by Appellant Commission pertaining to the subject matter of this action, the Federal District Court should have refused to exercise jurisdiction in this case 16

III.

Transportation by Appellee air carriers only between the mainland of California and Catalina Island is wholly within the State of California and involves intrastate and not interstate commerce. The rates covering such transportation are subject to the jurisdiction of the Appellant Commission 19

IV.

The provisions of the Constitution of the State of California under which Appellant Commission claims jurisdiction over Appellee air carriers pertain only to the establishment and regulation of rates, fares, and charges. Appellants have never claimed jurisdiction over any other aspect of Appellee air carriers' operations. Clearly, in so far as the judgment of the Federal District Court pertains to matters other than the establishment and regulation of rates, fares and charges over the route in question, it is not supported by the record and is in error 31

Conclusion 32

Table of Authorities Cited

Cases	Pages
Alabama State Federation of Labor v. McAdory, 325 U.S. 450	16
Colgrove v. Green, 328 U.S. 549	15
Corfu Channel Case, I.C.J. Reports, 1949, p. 4	29
Eccles v. Peoples Bank, 333 U.S. 426	15
Ex Parte Keil, 85 Cal. 310	22
Kelly v. Washington, 302 U.S. 1	30
Manchester v. Massachusetts, 139 U.S. 240	25
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41	15
Northwest Airlines v. Minnesota, 322 U.S. 292	30
People v. Stralla, 14 Cal. 2d 617	23, 24
Public Service Commission of Utah v. Wycoff, 344 U.S. 237	5, 12, 13, 14, 16, 17
United Air Lines v. Commission, 37 A.C. 633,1	3, 7, 31
United Air Lines, Inc., et al., 50 Cal. P.U.C. 563	3, 18, 31
United Air Lines v. Commission, 342 U.S. 908	3, 31
United Air Lines v. Commission, 344 U.S. 237 (1952)	8
United Kingdom v. Norway, I.C.J. Reports, 1951, p. 116	21, 23
United States v. California, No. 6, Original	19, 20, 22, 23
United States v. California, 332 U.S. 19	20, 27
Wilmington Transportation Co. v. Railroad Commission, 166 Cal. 741	22
Wilmington Transportation Co. v. Railroad Commission, 236 U.S. 153	22

Statutes	
Act of September 9, 1850, 9 Stat. 452	20
California Constitution:	
Art. I, Sec. 25	25
Art. XII, Sec. 20	8, 17, 18
Art. XII, Sec. 22	3, 7, 8, 9, 17
Art. XXI, Sec. 1	20, 21

	Pages
California Government Code:	
Sec. 170	24
Sec. 171	25
California Penal Code, Sec. 207	22
California Public Utilities Code:	
Secs. 1756-1767	19
Sec. 2107	4, 8, 9
United States Code, Title 28:	
Sec. 1331	9
Sec. 2281	9

Miscellaneous

4 Alaska Boundary Arbitration, p. 31	21
American Historical Association Annual Report, 1904, p. 279, Manning, The Nootka Sound Controversy	21

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, and PETER E. MITCHELL, Members of and Collectively Constituting the Public Utilities Commission of the State of California; EVERETT C. MCKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, and J. THOMASON PHELPS, Legal Advisers of the Public Utilities Commission of the State of California,

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BRIEF OF APPELLANTS UNDER RULE 12(3) IN OPPOSITION TO PLAINTIFFS-APPELLEES' STATEMENT AGAINST JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

PRELIMINARY STATEMENT.

Appellee air carriers in their Statement in Opposition to Appellants' Statement of Jurisdiction and Motion to Dismiss or Affirm (paragraph II,C,2) state that the facts of this case are not disputed and the only question is a legal one, namely: Does the Civil Aeronautics Act grant exclusive jurisdiction to the Civil Aeronautics Board to regulate rates charged by United over its Catalina Route? Such gross misstatement and over-simplification of the matters under consideration on this appeal cannot go unnoticed.

The issues raised by Appellants through this appeal are clearly set forth in the Assignment of Errors and Prayer for Reversal and the Statement as to Jurisdiction on file herein. Should this Court resolve in favor of Appellants certain disputed facts or certain questions of law which are in issue, this Court will not even be required to interpret the provisions of the Civil Aeronautics Act which Appellee air carriers claim grant to the Civil Aeronautics Board exclusive jurisdiction to regulate rates charged by them for transportation between the mainland of California and Catalina Island.

In response to Appellee air carriers' statement against jurisdiction and motion to dismiss or affirm, we shall more fully state the position of Appellants with respect to certain issues which we believe should be given further consideration by this Court.

I.

NO CASE OR CONTROVERSY EXISTS BETWEEN APPELLEES AND APPELLANTS WHICH ENTITLES APPELLEES TO THE EQUITABLE RELIEF GRANTED BY THE FEDERAL DISTRICT COURT. UNTIL THE ADMINISTRATIVE PROCESSES OF APPELLANT COMMISSION ARE EXHAUSTED THE FEDERAL DISTRICT COURT HAS NO JURISDICTION.

A. No provision of the laws of the State of California imposes penalties upon United by reason of its refusal to file with Appellant Commission tariffs of the rates covering its Catalina operations prior to the issuance of an order by Appellant Commission pursuant to the procedural provisions of the California Public Utilities Code.

Appellee air carriers have made no reference to any provision in the Constitution and statutes of the State of California which requires them to file tariffs with this Commission, for there is none.

Section 22 of Article XII of the California Constitution authorizes Appellant Commission to establish intrastate rates for air carriers operating in California. Pursuant to this provision, Appellant Commission may establish such rates by authorizing or ordering air carriers to file tariffs with Appellant Commission.

> *United Air Lines, Inc., et al.*, 50 Cal. P.U.C. 563 (1951); certiorari denied, *United Air Lines v. Commission*, 37 A.C. 633, 1 (1951); appeal dismissed, *United Air Lines v. Commission*, 342 U.S. 908 (1952).

Until Appellant Commission issues such an order pursuant to the procedural provisions of the California Public Utilities Code, and until such an order becomes effective, Appellee air carriers subject themselves to no

liability for penalties under Section 2107 of the Public Utilities Code by reason of their failure to file tariffs.

B. The letters from the Secretary of the Commission instructing United to file its tariffs were not issued pursuant to the procedural provisions of the Public Utilities Code and are not orders of the Appellant Commission which may be enforced by contempt proceedings or penalty actions brought pursuant to Section 2107 of the California Public Utilities Code.

Appellee air carriers state that prior to the trial of the case that Appellant Commission made no indication that it did not consider its letters to Appellees to be final administrative orders and determinations. The explanation is obvious. Prior to the trial of the case Appellants had no thought that anyone would construe the letters from the Commission Secretary to be final administrative orders and determinations.

Appellee United is familiar with Commission procedures, and Appellee air carriers are presumed to know that the Commission must proceed with an orderly hearing on the complaint of a proper party or in a formal investigation instituted on its own motion before it can make a final determination and issue an effective and enforceable order directing Appellee air carriers to file tariffs with the Commission. The record shows Appellee air carriers were not misled by the letters from the Commission Secretary.

We quote from the transcript of the hearing for preliminary injunction, August 8, 1952, pages 49 and 50:

> "Judge Orr: It is our thought, Mr. Treadwell, that right now your job is to convince us that this is the proper forum to bring this action before.

"Mr. Treadwell: Oh, yes, I will be glad to do that.

"Judge Orr: We are more concerned about that right now than any other phase of the case.

"Mr. Treadwell: Well now, the situation is this, your Honor, on that: If the Public Utilities Commission had made some order which controls this route, undertook to control the route, there is no doubt that the proper procedure would be a writ of review from that order to the Supreme Court of the United States [California]. That would be what would be the actual way to proceed, the way you could proceed.

"But there is nothing of that kind here. There is no order. We have waited now a minimum of six years, and probably much longer, according to the allegation of the complaint . . ."

We also quote from pages 63 and 64 of the same transcript, Mr. Treadwell speaking:

". . . if the Commission only threatened something, if they actually had done something, if they actually had done something, our remedy of course would be to go to the Supreme Court on a writ of review."

As recently as February 19, 1953, Appellee air carriers on page 7 of their answer to Appellants' motion for new trial in comparing the facts of *Public Service Commission of Utah v. Wycoff*, 344 U.S. 237 (1952) with those of the case here under consideration, stated regarding the present case: "There was no litigation pending, nor was there any existing administrative action concerning the route at the time the suit was commenced."

We can only ask why should Appellants have informed Appellee air carriers that the letters from the Commis-

sion Secretary were not to be construed as final administrative orders and determinations when Appellee air carriers themselves, both priorly and subsequently to the trial of this matter, declared such to be the case?

C. Appellants have made no threat to institute penalty actions against United by reason of its refusal to file tariffs of its rates covering its Catalina operations.

We have shown that there is no basis in law for the institution of penalty actions against Appellee United by reason of its refusal to file tariffs pursuant to the instructions contained in the letters from the Commission Secretary.

The letters from the Secretary of the Commission contain no threats that Appellants will institute penalty actions if the tariffs are not filed. We have previously pointed out in our jurisdictional statement that Appellants have made no such verbal threats.

Finding 11 of the Three-Judge District Court states that Appellants disclaim any intention of instituting proceedings to recover penalties against Appellee United for its failure to file tariffs with the Commission unless and until such time as United fails to file its tariffs with Appellant Commission after having been formally ordered to do so in a proceeding instituted before the Commission for the purpose of ascertaining jurisdiction.

Appellees have pointed out that Appellants in the past have caused proceedings to be instituted in the California courts for the recovery of penalties against various air carriers, including Appellee United, in other cases wherein

disputes have existed concerning the regulatory jurisdiction of Appellant Commission.

A brief summary of the facts and the considerations which led Appellant Commission to institute the penalty action against Appellee United will disclose matters *which are entirely dissimilar and not present in the case here under consideration.*

Prior to March 1, 1951, United had tariffs on file with the Public Utilities Commission covering its coach fares between San Francisco and Los Angeles, and these fares were thereby established by the Commission under Section 22 of Article XII of the California Constitution.

United, prior to March 1, 1951, applied to the Public Utilities Commission for authorization to increase such coach fares on March 1. The Commission refused to grant the application because insufficient information had been furnished. Nevertheless, on March 1, United increased its fares without the necessary authorization from the Commission.

After the institution by the Commission of a formal investigation and public hearing the Commission issued its Decision No. 45624, 50 Cal. P.U.C. 563, effective May 9, 1951, authorizing United to increase its fares and ordering United to make reparation of the excess fares collected between March 1 and May 8, 1951, inclusive. A petition for writ of review of this decision was filed with the California Supreme Court. The writ was denied. *United Airlines v. Commission,* 37 A. C. 563, 1 (1951). The appeal to this Court was dismissed on the ground that no sub-

stantial Federal question was involved. *United Airlines v. Commission*, 344 U. S. 237 (1952).

Subsequently, the People of the State of California filed a penalty action against United under Section 2107 of the California Public Utilities Code. This proceeding was filed because United, in violation of the provisions of Sections 20 and 22 of Article XII of the California Constitution, had charged during the period March 1 through May 8, 1951, fares in excess of those established and authorized by the Commission. Also, the Commission anticipated that United actually would reparate only a small amount of an estimated $66,500 excess fares which had been unlawfully collected, by reason of (1) the inadequacies of its own records, (2) the lapse of time between March 1, 1951, and the final adjudication of the matter in the United States Supreme Court, and (3) the fact that the excess charge on each one-way fare amounted to only $1.75. United's reparation program is now complete. An estimated $65,000 of excess fares unlawfully collected remains unrefunded. Unless these funds are recouped through penalty actions, or otherwise, by the People of the State of California, United will have profited substantially from its unlawful disregard of Commission jurisdiction.

Do the above essential facts exist in the present case? The answer is an unequivocal *no!* The Commission has made no claim that Appellee air carriers have charged fares in excess of those established and authorized by the Commission, but, on the contrary, admits that no fares covering Appellee air carriers' Catalina operations have

been established by the Commission. Appellants are here asserting only that they should be permitted to institute a proceeding before the Commission for the purpose of determining whether rates covering Appellee air carriers' Catalina operations should be established pursuant to Section 22 of the California Constitution.

In the previous *United Air Lines* case before this Court the Commission argued that no substantial Federal question was involved, and this Court agreed. In the present case Appellants are now arguing that the issues involved are substantial because they involve the same principle which this Court sustained in Appellants' favor in the proceeding adverted to above.

D. As no substantial question concerning the validity of a state statute (i.e., Section 2107 of the California Public Utilities Code) under the Federal Constitution is in issue, the Three-Judge Federal District Court has no jurisdiction under Section 2281 of Title 28, United States Code, and should have dissolved itself.

We again refer this Court to the cases cited in paragraph numbered 3 under the heading "The Questions Are Substantial" in our jurisdictional statement on file herein.

E. The institution of an investigation before Appellant Commission to determine whether Appellant Commission should establish rates for the transportation in question pursuant to Section 22 of Article XII of the California Constitution will not subject Appellees to irreparable injury in an equitable sense even though Appellee air carriers may expend sums in excess of $3,000 in responding to such investigation.

Appellee air carriers claim that a case or controversy exists under Section 1331 of the Judicial Code, 28 U. S. Code 1331, wherein the sum of more than $3,000 is in-

volved because the Three-Judge Federal District Court has found that the sums which Appellee air carriers will expend in responding to an investigation proceeding before the Appellant Commission to determine whether said Commission should establish rates for Appellee air carriers' Catalina operations will exceed $3,000. Just as illogically Appellee air carriers could argue that there is a case or controversy involving over $3,000 because Appellants and Appellees have expended and will expend aggregate sums considerably in excess of $3,000 in prosecuting and defending the present action in the Federal District Court and the United States Supreme Court, and also in the United States Court of Appeals for the Ninth Circuit where Appellants have taken a precautionary appeal to protect themselves should this Court hold that the Three-Judge Federal District Court had no jurisdiction and should have dissolved itself.

The sums which Appellees may expend in any forum resolving the issues now before this Court do not constitute the subject matter of this action nor do they constitute such irreparable injury as will entitle them to equitable relief.

Appellees actually may incur greater expenditures by reason of their seeking to have the issues determined first in the Federal District Court instead of permitting the administrative process to take its normal course.

Who can say what order would have emanated from Appellant Commission were the facts and legal issues fully presented to it for determination? Certainly the Commission is not bound by the opinions of its Chief

Counsel in deciding matters under consideration before it. It renders its own decisions after due deliberation upon the matters presented at the hearing. On many occasions the Commission has modified or reversed its own decisions in the light of matters presented for consideration on rehearing.

Suppose the Commission had formally ordered Appellee air carriers to file tariffs covering their Catalina operations and Appellees had filed a petition for writ of review with the California Supreme Court. Who can say what disposition would have been made of such a petition by the California Supreme Court? Certainly Appellants would be less likely to seek an appeal to this Court from an adverse decision of the California Supreme Court than from an adverse decision of a Federal District Court because the decision of the California Supreme Court on questions of State law would be final against Appellants.

Suppose this Court agrees with Appellants that Appellee air carriers must exhaust their administrative remedies before Appellant Commission and their remedies in the courts of the State of California before this Court will consider the Federal issues on their merits.

The decision of the District Court assumes to decide that requiring a litigant to exhaust his administrative remedies subjects him to irreparable injury. Under the social compact of a nation devoted to the principle that it shall be a government of laws and not of men, there is implicit the condition that orderly and lawful proceedings before proper governmental bodies must be required even though expense, annoyance and displeasure be incurred in

such proceedings. It is a part of the small price we pay for ordered liberty, freedom and justice. We assert that the restraining of the sovereign rights of a State by a Federal court presents a question of the greatest moment and one which this Court, as the final lawful tribunal of the land, should view with the gravest concern.

F. There is no evidence in the record and consequently no finding that Appellant Commission will establish rates for Appellee United covering the operations in question different than the rates already established in its tariffs on file with the Civil Aeronautics Board. Consequently, Appellees' concern regarding federal penalties is premature.

Appellee United's concern over Federal penalties is premature.

If Appellant Commission establishes the same rates as have been established in tariffs on file with the Civil Aeronautics Board, Appellee air carriers have no problem respecting penalties. If Appellant Commission establishes different rates, its order may be stayed until the jurisdictional questions are resolved.

In any event, no controversy arises until Appellant Commission has taken appropriate administrative action establishing rates for Appellee air carriers' Catalina operations.

G. This Court's recent decision in Public Service Commission of Utah v. Wycoff supports Appellants' contention that exhaustion of the administrative processes before Appellant Commission is a condition precedent to the exercise of jurisdiction by the Federal District Court.

The decision of this Court in *Public Service Commission of Utah v. Wycoff*, 344 U.S. 237 (1952) states on pages 240-241:

"... In addition to defects that will appear in our discussion of declaratory relief, it [this proceeding] is wanting in equity because there is no proof of any threatened or probable act of the defendants *which might cause the irreparable injury essential to equitable relief by injunction.*" (Emphasis added.)

This statement doesn't say that there was no proof of any threatened or probable act of the defendants. It says that there was no proof of any threatened or probable act of the defendants "which might cause the irreparable injury essential to equitable relief by injunction." This Court knew that in its brief the Utah Commission had asserted it would prevent Wycoff from conducting the business in question unless and until authorized to do so by appropriate administrative order.

The *Wycoff* decision on page 244 continues:

"... We may surmise that the purpose to be served by a declaratory judgment is ultimately the same as respondent's explanation of the purposes of the injunction it originally asked, which is *'to guard against the possibility* that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission.' (Emphasis supplied.)"

On page 245 of the decision this Court states:

"... We are also told that the Commission filed a petition in Utah state court to enjoin respondent from operating between a few specified locations within the State, but that process was never served and nothing in the record tells us what has happened to this action. We may conjecture that respondent fears some form of administrative or judicial action

> to prohibit its service on routes wholly within the State without the Commission's leave. What respondent asks is that it win any such case before it is commenced. . . ."

Appellee air carriers have brought this action to guard against the possibility that Appellant Commission in a proceeding proposed to be brought before itself to determine whether it has jurisdiction to and should establish rates covering the operations in question will establish such rates. Appellee air carriers ask that they win any such proceeding before it is even commenced. Even after the administrative process is complete, Appellee air carriers will probably not subject themselves to the possibility that penalty actions may be brought against them, because (1) Appellant Commission may establish as the rates for the operations in question, rates which Appellee air carriers now have on file with the Civil Aeronautics Board, and (2) the effectiveness of any such order may be stayed by the Appellant Commission itself, or by the California Supreme Court and this Court, until the jurisdictional questions are fully clarified and determined.

In the *Wycoff* decision, on pages 245-247, this Court continues:

> ". . ., this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment. If there is any risk of suffering penalty, liability or prosecution, which a declaration would avoid, it is not pointed out to us . . .

"Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Eccles v. Peoples Bank*, 333 U. S. 426. See *Colgrove v. Green*, 328 U.S. 549. Responsibility for the effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts."

The issuance of a rate order by Appellant Commission establishing rates for the operations in question would be the exercise of legislative authority delegated to Appellant Commission. Such a rate order has not yet been issued. Nevertheless, Appellees urge and the Federal District Court has declared that Appellant Commission has no power to issue an order establishing such rates, or even to consider the establishment of such rates, in a proceeding instituted before itself pursuant to the provisions of the California Public Utilities Code. We urge that this Court not permit the quasi-legislative processes under which Appellant Commission functions to be so aborted.

II.

AS AN ADEQUATE REMEDY EXISTS IN THE COURTS OF THE STATE OF CALIFORNIA FOR THE PURPOSE OF REVIEWING ANY ORDER ISSUED BY APPELLANT COMMISSION PERTAINING TO THE SUBJECT MATTER OF THIS ACTION, THE FEDERAL DISTRICT COURT SHOULD HAVE REFUSED TO EXERCISE JURISDICTION IN THIS CASE.

This Court was concerned with the Federal-State relationship in the *Wycoff* case. The Court undoubtedly will be concerned with the Federal-State relationship in the case now being considered.

On page 247 of the *Wycoff* case this Court's enunciation of the principle involved is clear:

> "Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the state. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the state affected. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission cannot hear evidence and decide the matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal

judgment serves no useful purpose as a final determination of rights.

"The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right."

We again wish to point out to this Court that Appellants are making no claim under Federal law. The claim of jurisdiction over Appellee air carriers' rates is founded on Section 22 of the California Constitution. If Appellant Commission is permitted to proceed with its hearing the Federal question will be raised only as a matter of defense by the Appellee air carriers. The language from pages 248 and 249 of the *Wycoff* case quoted in our jurisdictional statement shows that under these circumstances Appellee air carriers are entitled to no equitable relief in the Federal District Court.

Appellee air carriers assert that Section 20 of Article XII of the Constitution of California limits judicial review of rate action by Appellant Commission to questions of confiscation, and claim that since the review is so limited it is inadequate for the controversy here involved.

We wish to point out to this Court that Section 20 of Article XII of the California Constitution is not involved in this proceeding. No application to increase rates or charges for the transportation in question has been filed by Appellee air carriers with Appellant Commission.

Section 20 reads as follows:

> "No railroad or other transportation company shall raise any rate or charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the railroad commission [now Public Utilities Commission] provided for in this Constitution, that such increase is justified, and *the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property.*" (Emphasis added.)

The above-quoted limitation is on judicial review of a Commission decision upon a showing whether an increase in rates is justified, not on a Commission decision on the question whether it has jurisdiction to establish rates for a carrier.

This Court will note that Appellee United had no hesitancy in urging review of jurisdictional matters in its recent appeals from Commission Decision No. 45624, *United Air Lines, et al.*, 50 Cal. P.U.C. 563 (1951), to the California Supreme Court and to the United States Supreme Court, supra. We are confident that both courts had no hesitancy in considering on their merits the jurisdictional questions raised by United. It is preposterous for Appellee air carriers to urge before this Court that they are precluded under California law from obtaining effective judicial review of rate action taken by Appellant Commission when no issue of confiscation, but only issues relating to jurisdiction, are involved.

Sections 1756 through 1767 of the California Public Utilities Code not only provide adequate, but also preferred, judicial review of orders and decisions of the Appellant Commission. If, as Appellees state, their remedies in the California courts are *niggardly*, it is because of the questionable merits of their case and not because inadequate provision has been made under the California law for judicial review.

III.

TRANSPORTATION BY APPELLEE AIR CARRIERS ONLY BETWEEN THE MAINLAND OF CALIFORNIA AND CATALINA ISLAND IS WHOLLY WITHIN THE STATE OF CALIFORNIA AND INVOLVES INTRASTATE AND NOT INTERSTATE COMMERCE. THE RATES COVERING SUCH TRANSPORTATION ARE SUBJECT TO THE JURISDICTION OF THE APPELLANT COMMISSION.

A proceeding to ascertain the exact boundaries of the State of California is now before this Court. *United States v. California*, No. 6, Original.

In this proceeding the State of California claims that the waters between the mainland of California and Catalina Island are inland waters of the State of California. The Report of the Special Master dated October 14, 1952, finds otherwise, but the State of California has filed exceptions to this report.

Appellants herein likewise claim that the route in question is wholly within the boundaries of the State of California. In support of this claim, we refer this Court to the comprehensive brief dated June 6, 1952, submitted by the Attorney General of the State of California in the

proceeding before this Court, entitled *United States v. California*, No. 6 Original.

We shall briefly state the arguments in support of our claim that the route in question is wholly within the boundaries of the State of California.

Section 1 of Article XXI of the California Constitution of 1849 defines the westward boundary of the State of California as follows:

> "Section 1. The boundary of the State of California shall be as follows: . . . thence running west and along said boundary line, to the Pacific Ocean, and extending therein three English miles; thence, running in a northwesterly direction and following the direction of the Pacific Coast, to the forty-second degree of north latitude; thence, on the line of said forty-second degree of north latitude, to the place of beginning. Also all the islands, harbors, and bays along and adjacent to the coast."

Congress accepted the California Constitution and passed the Act of Admission. (Act of Sept. 9, 1850, 9 Stat. 452.)

Under the decision of this Court in *United States v. California*, 332 U.S. 19, this Court recognized that all waters shoreward of the base line of the three-mile marginal belt are inland waters. Hence, all the area within California constitutional boundaries, with the exception of the three-mile marginal belt, constitute inland waters of the State.

The inclusion of the islands as specified in the California Constitution strongly suggests that the boundary was in-

tended to run around them. The phrases "running in a northwesterly direction" and "following the direction of the Pacific Coast" indicate that the boundary of California runs outside the off-lying islands.

Such a boundary would be consistent with the position taken by the United States in the Alaska Boundary Arbitration that the relevant coast line for boundary purposes is the political coast line which treats all off-lying islands as part of the mainland (4 Alaska Boundary Arbitration 31) and with the decision of the International Court of Justice in *United Kingdom v. Norway*, I.C.J. Reports, 1951, p. 116, previously referred to in our jurisdictional statement.

Sound historical basis supports the establishment of the California boundary so as to include as its inland waters the area shoreward of the off-lying islands. In 1790, when California was still a Spanish possession, England expressly stipulated in Article 4 of the Nootka Treaty with Spain that "British subjects shall not navigate nor carry on their fisheries in the said seas within the distance of 10 maritime leagues from any part of the coast already occupied by Spain." (W. R. Manning, *The Nootka Sound Controversy*, Am. Hist. Assn. Annual Report 1904, p. 279.) A line 10 maritime leagues from the coast would include the waters between the California mainland and Catalina Island.

In 1879 the last sentence of Section 1 of Article XXI of the California Constitution was revised to read: "Also, including all islands, harbors, and bays along and adjacent to the coast."

We quote from the California Attorney General's brief dated June 6, 1952, in *United States v. California*, No. 6, Original, the discussion concerning certain California cases.

Pages 49 and 50:

"The first case in which the constitutional provision came before the California Supreme Court was *Ex parte Keil*, 85 Cal. 310 (1890). There the Court held that the transportation of two sailors from the California mainland to Catalina Island did not constitute taking them 'out of this state' within the meaning of the California kidnapping statute. (Penal Code Sec. 207.) The Court reached the conclusion as a matter of construction of the Penal Code and it did not decide the 'nice and important question, as to which the Court is not agreed, . . . whether or not any part of the channel between Santa Catalina and the mainland is, as between the state and the nation, or as between the United States and foreign nations, a part of the high seas.' However, the concurring opinion by two judges makes it apparent that the other five members of the Court were of the opinion that the channel waters were a part of this state.[13]"

Note 13 on page 50 reads:

"[13]In *Wilmington Transportation Co. v. Railroad Commission*, 166 Cal. 741 (1913), affirmed 236 U.S. 153 (1915), the California Supreme Court held that transportation of freight and commerce from the California mainland to Catalina is not 'commerce with foreign nations' so as to oust the State Railroad Commission of jurisdiction. The Court assumed that the cross-channel voyage took the vessels on to the high seas and out of the jurisdiction of California. Since, however, the question was not raised or argued, these

assumptions cannot be considered authoritative. Moreover, in considering the effect of this case, it is well to bear in mind the following statement by the International Court of Justice in *United Kingdom v. Norway*: 'The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice.' (Judgment p. 138.)"

Pages 51 and 52:

"Probably the most significant of the California Supreme Court cases is the most recent one, *People v. Stralla*, 14 Cal. 2d 617 (1939). The question in the case was whether a gambling ship anchored four miles from shore in Santa Monica Bay was within California's territorial jurisdiction so as to be subject to her criminal statutes. The District Court of Appeal held that there was no such jurisdiction.

"In his petition for hearing in the Supreme Court the Attorney General of California urged as his first point that Santa Monica Bay was a bay within the meaning of that term as used in the California constitutional provision. The Attorney General went on, however, to devote a section of his petition to the proposition that under the Constitution, 'That body of water lying easterly of the islands adjacent to the coast is within the boundaries of the state of California.' In the course of the argument, the Attorney General pointed out that 'by the very words of the Constitution the islands are included within the boundary,' and that 'by including the islands within the boundary, the water lying easterly of the islands is necessarily within the boundary.' This position ad-

vanced by California constitutes in itself an assertion of jurisdiction by the state.

"'. . . the United States Attorney, who stated (Appendix 3, p. 2) that he was 'acting on the express direction of the Attorney General of the United States and in the name and in behalf of the United States of America,' filed an *amicus curiae* brief in support of California in which he adopted the brief for California in its entirety. (Appendix 3, p. 12.) On the basis of these briefs, the California Supreme Court determined that Santa Monica constitutes a bay within the meaning of that term as used in the Constitution of 1849. Consequently the Court held that 'the jurisdiction of the state extends over the waters of Santa Monica Bay landward from a line drawn between its headlands, Point Vincente and Point Dume, and *at least* for a distance of three miles oceanward from that line.' (14 Cal. 2d, at 633.) The inclusion of the phrase 'at least' in the holding indicates that while the Court was following the salutary principle of deciding no more than necessary to dispose of the case before it, it wished to preserve California's jurisdiction beyond the area in dispute." (Italics ours.)

In 1949 the California legislature in Section 170 of the Government Code spelled out with more precision the western boundary which was defined in the Constitution one hundred years earlier:

"170. *Declaration of boundary of State.* To give greater precision to the boundary of the State of California as defined in Article XXI of the Constitution, it is hereby declared that the part of the boundary which is described as 'running in a northwesterly direction and following the direction of the Pacific

Coast to the forty-second degree of north latitude,' and as 'including all the islands, harbors, and bays along and adjacent to the coast,' runs and has in the past run three English nautical miles oceanward of lines drawn along the outer sides of the outermost of the islands, reefs and rocks along and adjacent to the mainland and across intervening waters; . . ."

Section 171 of the Government Code defines inland waters as follows:

"171. *Inland waters of State defined.* All waters between the mainland and the outermost of the islands, reefs and rocks along and adjacent to the coast of the State of California from which the boundary of the State is measured, and all waters between the islands, reefs and rocks themselves, are declared to be and to have been in the past inland waters of the State. Similarly, all waters within the lines around harbors and across bays, from which the boundary of the State is measured, are declared to be and to have been in the past inland waters of the State. These waters are 'waters thereof' within the meaning of that phrase in Section 25 of Article I of the Constitution."

We quote further from the brief of the Attorney General of California, pages 57 and 58:

"In establishing its seaward boundary so as to assert jurisdiction over the channels, bays, and harbors along its coast, California was acting well within its authority under the federal system. In *Manchester v. Massachusetts*, 139 U.S. 240 (1891) the United States Supreme Court had before it a situation which closely parallels the assertions of jurisdiction

that have been made by California. The Public Statutes of Massachusetts provide that 'when an inlet of the sea does not exceed two marine leagues in width between its headlands,' the boundary of the state is a 'straight line from one headland to the other.' Massachusetts sought to enforce in Buzzard's Bay its statutes regulating fishing which were confined by their terms to waters 'within the jurisdiction of this Commonwealth.' Manchester challenged the enforcement of the regulatory statutes on the grounds that the waters of the Bay were beyond the jurisdiction of Massachusetts. He argued that jurisdiction over the waters of the Bay rested 'upon rights of sovereignty inseparably connected with national character' and thus was exclusively vested in Congress.

"The Supreme Court explicitly upheld the authority of Massachusetts to define its boundaries so as to bring within its jurisdiction such inland water areas as Buzzard's Bay. The Court said:

> "'. . . Within what are generally recognized as the territorial limits of States, by the law of nations, a State can define its boundaries on the sea and the boundaries of its counties; and by this test the Commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties.'

As this quotation indicates the only restriction placed by the Court on the State's power to assert jurisdiction over inland waters was that the assertion must not exceed the limits of international law. The Court went on to hold that in the absence of any conflicting federal regulation, Massachusetts could exercise its jurisdiction over the Bay by enforcing its statutes regulating fishing."

We also quote from pages 118-121 of the brief of the Attorney General of California:

"1. Many nations have found it advantageous to adopt the exterior coastline extending around off-lying islands as the baseline for their marginal sea. These nations include Australia, Canada, Denmark, Ecuador, Fiji, Finland, France, Hawaii, Iceland, Iran, Norway, Russia, Saudi-Arabia, Sweden;

"2. The system of the exterior or political coast line contravenes no principle of international law;

"3. The use of the exterior coast line as a base line for the marginal sea does not depend on any arbitrary or limited distance that such a line may extend across a water area. The line in each case is a political line based upon laws or decrees of a sovereign state and not upon any arbitrary limitation of distance;

"4. That the United States is free, if it finds that it is in the national interest to do so, to recognize and declare that the waters between the off-lying islands of California and the mainland are wholly inland waters.

"*National Security.* The Supreme Court recognized the close relationship between the marginal belt and our national security by pointing out that it was a 'protective belt' which will be of 'crucial importance should it ever again become impossible to preserve that peace.' (332 U. S. at 35.) As this statement by the Supreme Court indicates, the military advantage or disadvantage of any of the suggested locations of the marginal belt is a matter of the highest importance to our national security.

"The strategic importance of the California coastal areas is amply demonstrated by mentioning a few of the many military installations which dot the shoreline and the offlying islands of the area in issue here. San Clemente Island has been completely taken over by the Navy and civilians are not permitted to enter. [Tr. p. 613.] Defense installations have been made on San Miguel and San Nicolas Islands in the Santa Barbara Channel. [Tr. p. 330.] A substantial part of the facilities on Catalina Island were taken over for defense purposes during World War II.

"These islands guard a chain of Army, Navy and Air Corp bases on the shore of the mainland. Shoreward from the Santa Barbara Channel lies Point Mugu, an important guided missile installation, and Point Hueneme, which has tremendously expanded as a Navy base in recent years. [Tr. p. 248.] San Pedro Bay is a western base for the Pacific Fleet of the Navy, as well as being adjacent to the Navy Air Station at Reeves Field and the Army's Fort MacArthur. San Clemente Island protects the approach to the major Navy base at San Diego, the Navy Air Station at North Island and the Marine Base at Camp Pendleton.

"The presence of these vital military installations in the coastal areas in issue here make it especially relevant to reiterate that the distribution of rights in the offshore area among various nations will be determined by fixing the outer limits of inland water. As we move seaward through the water areas which our nation may designate as its inland waters and marginal belt to the high sea, the rights and powers of the United States diminish, while conversely, the rights of foreign nations increase. This is strikingly illus-

trated by the rights of foreign warships and airplanes in the respective zones in the offshore area.

"Foreign warships and aircraft are at all times wholly unrestricted in their movement of the high seas. The rights of foreign warships in the marginal belt are at present in doubt, as shown by the fact that the International Court of Justice declined to rule on this point in the Corfu Channel case.[29] But in its inland waters, the adjacent nation has exclusive and complete control.

"The agency which determines the outer limits of inland waters will thus be doing much more than fixing a theoretical line. It will be determining how near foreign warships and aircraft may lawfully approach our shores and harbor installations. It also will be fixing the location of our neutrality zone, for that has been one of the historic functions of the marginal belt. The sum of the matter is that the fixing of the baseline will determine whether foreign nations are to have rights in the waters surrounding our island military installations and between these installations and our coastal bases *or* whether those waters are to be set aside for the exclusive jurisdiction of the United States.

"It would appear that there are military dangers to placing the belt immediately adjacent to our shores, and on the other hand, military advantages to placing it as far seaward as possible. It is the belief of California that the protection of our harbors, the security of our military bases on the shore and on the offshore islands, and the integrity of our inland shipping lanes demand the placement of the marginal belt as far sea-

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[29] I. C. J. Reports, 1949, p. 4.

> ward as can be done within the limits of international practice. There would appear to be a substantial risk of subverting the best interests of our nation by the adoption of a proposal for the location of the marginal belt, such as that offered by Plaintiff, which completely ignores the significance of the areas to our National security."

In support of their position that the Civil Aeronautics Board has exclusive jurisdiction over the rates in question, Appellee air carriers state that they have had tariffs of rates covering the operations in question on file with the Civil Aeronautics Board for thirteen years and that they have never filed tariffs of such rates with Appellant Commission. Even though this Court finds that Appellee air carriers must file rates covering its Catalina operations with Appellant Commission, Appellee air carriers undoubtedly will continue to file such rates with the Civil Aeronautics Board in so far as they involve interstate commerce. United is an interstate as well as an intrastate air carrier and hence must file rates covering its California operations both with the Civil Aeronautics Board and with the Appellant Commission. For example, tariffs of United's air coach fares for passenger transportation between San Francisco and Los Angeles are on file with both Commissions. The fact that the Appellant Commission may not have asserted jurisdiction over rates in question for a period of years does not destroy its authority to do so. *Kelly v. Washington*, 302 U.S. 1 (1937).

The case of *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944) to which reference is made by Appellee air

carriers refers to "regulating air commerce" and not to "regulating air transportation". Under the Civil Aeronautics Act the Civil Aeronautics Board regulates only the rates charged by air carriers in "air transportation".

We submit that the route of Appellee air carriers in question is an intrastate route, and the intrastate rates in question may be established by Appellant Commission. *United Air Lines, Inc. et al.*, 50 Cal. P.U.C. 563 (1951); certiorari denied, *United Air Lines v. Commission*, 37 A. C. 633, 1 (1951); appeal dismissed, *United Air Lines v. Commission*, 342 U.S. 908 (1952).

IV.

THE PROVISIONS OF THE CONSTITUTION OF THE STATE OF CALIFORNIA UNDER WHICH APPELLANT COMMISSION CLAIMS JURISDICTION OVER APPELLEE AIR CARRIERS PERTAIN ONLY TO THE ESTABLISHMENT AND REGULATION OF RATES, FARES, AND CHARGES. APPELLANTS HAVE NEVER CLAIMED JURISDICTION OVER ANY OTHER ASPECT OF APPELLEE AIR CARRIERS' OPERATIONS. CLEARLY, IN SO FAR AS THE JUDGMENT OF THE FEDERAL DISTRICT COURT PERTAINS TO MATTERS OTHER THAN THE ESTABLISHMENT AND REGULATION OF RATES, FARES AND CHARGES OVER THE ROUTE IN QUESTION, IT IS NOT SUPPORTED BY THE RECORD AND IS IN ERROR.

This Court will note that Appellee air carriers have made no comment regarding Appellants' claim that the judgment of the Federal District Court is too broad in its scope and hence clearly is not supported by the record.

CONCLUSION.

It is submitted (1) that neither the Three-Judge Federal District Court nor any Federal District Court had jurisdiction of the subject matter of this case because no definitive, final and effective administrative action has been taken by Appellants, (2) that even though the Federal District Court have jurisdiction it should have refused to exercise jurisdiction because the remedies in the California courts are adequate, (3) that in any event, this Court should render judgment in favor of Appellants because the route in question and the rates in question are intrastate, and (4) in so far as the judgment of the Federal District Court pertains to matters other than the establishment of rates over the route in question, it is in error.

The questions presented by this appeal are substantial. We urge this Court to deny Appellee air carriers' motion to dismiss or affirm and to note probable jurisdiction.

Dated, May 1, 1953.

Respectfully submitted,

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J. THOMASON PHELPS,
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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of May, 1953.

.....

Attorney for Plaintiffs-Appellees.

.....

Attorney for Intervenor-Appellee.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, et al.,

Appellants,

vs.

UNITED AIR LINES, INC., CATALINA AIR TRANSPORT and CIVIL AERONAUTICS BOARD,

Appellees.

Appeal from the United States District Court for the Northern District of California.

BRIEF OF THE APPELLANTS.

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	4
Specification of errors	11
Summary of argument	16
Argument:	
I. The Federal District Court had no jurisdiction to decide the case on its merits	21
A. The California Constitution authorizes the State Commission to establish rates for common carriers. No provision of the State law requires air carriers to file tariffs with the State Commission prior to the issuance of an order by the State Commission pursuant to the procedural provisions of the California Public Utilities Code	21
B. The letters from the Secretary of the Commission instructing United to file its tariffs were not issued pursuant to the procedural provisions of the Public Utilities Code and are not orders of the State Commission which may be enforced by contempt proceedings, or penalty actions brought pursuant to Section 2107 of the California Public Utilities Code, or otherwise	21
C. The institution of an investigation before the State Commission to determine whether it should establish rates for the transportation in question will not subject appellees to such irreparable injury as will entitle them to declaratory and injunctive relief even though appellee air carriers may expend sums in excess of $3,000 in responding to such investigation	24

Page

D. Formal decisions of the State Commission are issued after consideration of the evidence and arguments presented at the formal hearing and need not necessarily reaffirm the position taken by its Chief Counsel or in prior administrative letters from its Secretary 26

E. The law of California imposes no penalty upon appellee air carriers for failure to file tariffs with the State Commission until said Commission effectively orders them to do so in a formal proceeding. Appellants have made no threats to and will not seek to impose penalties upon appellee air carriers for refusal to file tariffs of the rates in question prior to the issuance of such an effective order 27

F. There is no evidence in the record and consequently no finding that the State Commission will establish rates for appellee United covering the operations in question different from the rates already established in its tariffs on file with the Civil Arenonautics Board. Consequently, appellees' concern regarding federal penalties is premature. Appellee air carriers will not be subject to penalty under the Federal law if they apply intrastate rates to intrastate traffic 30

G. The exhaustion of the administrative processes before the State Commission is a condition precedent to the exercise of jurisdiction by the Federal District Court 31

II. The provisions of the Johnson Act prohibit the Federal District Court from enjoining the State Commission from establishing rates for the transportation in question 37

I. In so far as the judgment of the Federal District Court pertains to matters other than the establishment and regulation of rates, fares, and charges for transportation over the route in question, it is not supported by the record and is in error..... 38

Page

J. As there is no substantial question involved in this case concerning the validity under the Federal Constitution of Section 2107 of the California Public Utilities Act, the Three-Judge Federal District Court should have dissolved itself 39

II. The Federal District Court should have exercised its discretionary power to withhold equitable and declaratory relief in this case 40

A. An adequate remedy exists in the courts of the State of California for the purpose of reviewing any order issued by the State Commission pertaining to the subject matter of this action..... 40

B. The Federal District Court should have refused to issue a declaratory judgment because the declaratory complaints set forth a claim of right under the Federal law which in reality is in the nature of a defense to action proposed by the State Commission 45

III. Upon a consideration of the merits of this case, the Federal District Court should have declared that the rates for the transportation in question are subject to the jurisdiction of the State Commission and should have dissolved the temporary injunction..... 46

A. Transportation by appellee air carriers only between the mainland of California and Catalina Island is wholly within the State of California and involves intrastate and not interstate commerce. The rates covering such transportation are subject to the jurisdiction of the State Commission.. 46

B. Through the enactment of the Civil Aernonautics Act Congress has not preempted the regulation of the rates of appellee air carriers for transportation over the routes in question wholly between the mainland of California and Catalina Island 59

Conclusion 67

Appendix A, Statutes involved i

Appendix B, Correspondence xix

Citations

Cases

	Pages
Alabama Public Service Commission v. Southern Railway, 341 U.S. 341, 95 L.ed. 1002	42
Alabama Public Service Commission v. Southern Railway, 341 U.S. 363, 95 L.ed. 1016	43
Alabama State Federation of Labor v. McAdory, 325 U.S. 450	32
Arkansas R. R. Commission v. Chicago, Rock Island & Pac. R. R. Co., 274 U.S. 597, 71 L.ed. 1224	62
Bethlehem Steel Corp. v. N. Y. State Labor Relations Board, 330 U.S. 767	44
Bowles v. Case, 149 F.2d 777, aff. 327 U.S. 92	39
Brucker v. Fisher, 49 F.2d 759	2
California Water Service Co. v. City of Redding, 304 U.S. 252, 82 L.ed. 1323	39
Catalina Air, Service to Santa Catalina Island, 2 C.A.B. 798	4
City of Springfield v. U.S., 99 F.2d 860, 306 U.S. 650, 83 L.ed. 1049	39
Cloverleaf Co. v. Patterson, 315 U.S. 148	35
Colegrove v. Green, 328 U.S. 549	31
Corfu Channel Case, I.C.J. Reports, 1949, p. 4	56
Davies Warehouse Co. v. Bowles, 321 U.S. 144, 88 L.ed. 635	62
Eccles v. Peoples Bank, 333 U.S. 426	31
Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 87 L.ed. 424	34, 35
Ex Parte Bransford, 310 U.S. 354	39
Ex Parte Keil, 85 Cal. 310	49
Farmers Gin Co. v. Hayes, 54 Fed.Supp. 43	39
Federal Power Commission v. Arkansas Power & Light Co., 330 U.S. 802, 91 L.ed. 1261	33, 35
Federal Trade Commission v. Cement Institute, 333 U.S. 683, 92 L.ed. 1010	26
Gully v. Interstate Natural Gas Co., 292 U.S. 16, 78 L.ed. 1088	2

Pages

Hanley v. Kansas City Southern Railway, 187 U.S. 617... 64

Kelly v. Washington, 302 U.S. 1 59

Macauley v. Waterman S. S. Corporation, 327 U.S. 540, 90 L.ed. 839 35
Manchester v. Massachusetts, 139 U.S. 240 52
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 82 L.ed. 638 .....25, 31, 34

National Labor Relations Board v. Donnelly Garment Co., 330 U.S. 219, 91 L.ed. 854 26
National Labor Relations Board v. Pittsburgh Steamship Co., 337 U.S. 656, 93 L.ed. 1602 26
North Carolina v. United States, 325 U.S. 507, 89 L.ed. 1760 62
Northwest Airlines v. Minnesota, 322 U.S. 292 59

Palmer v. Massachusetts, 308 U.S. 79, 84 L.ed. 93..... 61
Palmetto Fire Ins. Co. v. Conn. Gas Co., 292 U.S. 16, 78 L.ed. 1088 2
Penn. Greyhound Lines v. Board of P.U. Comrs., 107 Fed. Supp. 521 39
People v. Stralla, 14 Cal. 2d 617 50
Petroleum Exploration, Inc. v. Public Service Commission of Kentucky, 304 U.S. 209, 82 L.ed. 1294 25
Poulos v. New Hampshire, 345 U.S. 395, 97 L.ed. (Adv. Ops.) 702 25
Public Service Commission of Utah v. Wycoff Company, Inc., 344 U.S. 237, 97 L.ed. 176 .....23, 31, 36, 43, 45
Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U.S. 456 .....35, 36

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 35
Rochester Telephone Corp. v. U.S., 307 U.S. 125, 83 L.ed. 1147 35
Rorick v. Board of Comm'rs of Everglades Drainage District, 307 U.S. 208, 83 L.ed. 1242 2

Taylor v. Carryl, 20 How. (U.S.) 583, 15 L.ed. 1028..... 44
Tobin v. Banks & Rumbaugh, 201 F. (2d) 223 33
Toucey v. New York Life Insurance Co., 314 U.S. 118, 86 L.ed. 100 44

Pages

United Air Lines, Inc., et al., 50 Cal. P.U.C. 563 ..... 21, 41, 59, 60
United Air Lines v. Commission, 37 A.C. 633, 1 ..... 21, 29, 59, 60
United Air Lines v. Commission, 342 U.S. 908 ..... 21, 29, 59, 60
United Air Lines, Operation of Catalina Air Transport, 6 C.A.B. 1041 4
United Air Lines v. Public Util. Comm. of California, 109 F. Supp. 13 1
United Kingdom v. Norway, I.C.J. Reports, 1951, p. 116 ..... 48, 49
United States v. California, Oct. Term, 1953, No. 6, Original 46, 48, 57
United States v. California, 332 U.S. 19 47
U.S. v. Morton Salt Co., 338 U.S. 632, 94 L.ed. 401 37
U.S. v. Yellow Cab Company, 338 U.S. 338, 94 L.ed. 150 60
U.S. v. Yellow Cab Company, 332 U.S. 218, 91 L.ed. 2010 60
Wilmington-Catalina Air, Grandfather Certificate, 1 C.A.A. 431 4
Wilmington Transportation Co. v. Railroad Commission, 166 Cal. 741 49
Wilmington Transportation Co. v. Railroad Commission, 236 U.S. 151, 59 L.ed. 508 60
Yonkers v. United States, 320 U.S. 685, 88 L.ed. 400 61

Statutes

Act of September 9, 1850, 9 Stat. 452 47
California Constitution:
Art. I, Sec. 25 52
Art. XII, Sec. 20 ..... 3, 29, 40
Art. XII, Sec. 22 ..... 3, 6, 21, 28, 29, 45
Art. XXI, Sec. 1 ..... 47, 48
California Government Code:
Sec. 170 ..... 3, 51
Sec. 171 ..... 3, 52
California Penal Code, Sec. 207 49
California Public Utilities Code:
Secs. 1701-1706 ..... 3, 6, 27
Sec. 1731 3

Pages

Secs. 1756-1767 ..... 3, 41
Sec. 2107 ..... 3, 8, 9, 15, 27, 29, 38, 39

Submerged Lands Act, Chapter 65, Public Law 31, 83rd Congress:
Sec. 2(a)(2) 4, 57
Sec. 4 ..... 4, 57

U. S. Code, Title 28, Judicial Code:
Sec. 1331 ..... 3, 12, 24
Sec. 1337 ..... 3, 12
Sec. 1342 ..... 3, 16, 37, 43
Sec. 2201 ..... 3, 12
Sec. 2281 ..... 3, 39
Sec. 2283 43

Title 49, Civil Aeronautics Act:
Sec. 401 (2) 4
Sec. 401 (10) 4
Sec. 401 (21) 4, 5, 63
Sec. 483 4
Sec. 484 (a) 4
Sec. 484 (b) 4

Miscellaneous

4 Alaska Boundary Arbitration, p. 31 48

American Historical Association Annual Report, 1904, p. 279, Manning, The Nootka Sound Controversy 48

Aviation Bills:
78th Congress:
Lea Bill, H. R. 1012 65
Revised Lea Bill, H. R. 3420 65
H. R. Report No. 784 on H. R. 3420, H. R. Committee on Interstate and Foreign Commerce 66
Boren Bill, H. R. 4845 65
Bailey Bill, S. 246 65

79th Congress:
Lea Bill, H. R. 674 65
Lea Bill, H. R. 3383 65
Johnson Bill, S. 541 65

	Page
80th Congress:	
Wolverton Bill, H. R. 2337	65
81st Congress:	
Brewster Bill, S. 423	65
Johnson Bill, S. 445	65
Johnson Bill, S. 2435	65
National Association of Railroad and Utilities Commissioners Proceedings:	
1944 N.A.R.U.C. Proceedings 221	65
1945 N.A.R.U.C. Proceedings 299	65
1946 N.A.R.U.C. Proceedings 210	65
1947 N.A.R.U.C. Proceedings 128	65
1948 N.A.R.U.C. Proceedings 69	65
1949 N.A.R.U.C. Proceedings 166	65
1950 N.A.R.U.C. Proceedings 106	65
U. S. Senate, Committee on Interstate Commerce, Hearings, 74th Congress, Vol. 1, page 68	63

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Appellees.

Appeal from the United States District Court for the Northern District of California.

BRIEF OF THE APPELLANTS.

OPINION BELOW.

The opinion of the United States District Court (R. 46-50) is reported at 109 F. Supp. 13.

JURISDICTION.

The judgment of the United States District Court was entered January 28, 1953 (R. 65-67). The order denying motion for a new trial was filed February 20, 1953 (R. 104). The petition for appeal was filed March 27, 1953 (R. 105) and the order allowing appeal was issued March 27, 1953 (R. 106). An order postponing jurisdiction was issued by this Court June 15, 1953 (R. 265). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 28 U.S.C. 2101(b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *Rorick v. Board of Com'rs. of Everglades Drainage District*, 307 U. S. 208, 83 L. Ed. 1242; *Gully v. Interstate Natural Gas Co.*, 292 U. S. 16, 78 L. Ed. 1088; *Palmetto Fire Insurance Co. v. Conn.*, 272 U. S. 295, 305, 71 L. Ed. 243, 247; *Brucker v. Fisher*, 49 F. 2d 759.

QUESTION PRESENTED.

Where the Secretary of the appellant California Public Utilities Commission has by letters instructed United Air Lines, Inc., to file tariffs covering its service between Los Angeles and Long Beach on the mainland of California, on the one hand, and Avalon on Santa Catalina Island, on the other, and where the Chief Counsel for said Commission has testified that, if the facts remain the same, in a formal investigatory proceeding proposed to be instituted before said Commission because of United's refusal to file such tariffs he will advise said Commission it has jurisdiction to establish rates covering such service, are

United and Catalina Air Transport and the Civil Aeronautics Board entitled (1) to a declaratory judgment issued by a Three-Judge Federal District Court that the Civil Aeronautics Board has exclusive jurisdiction over said air carriers in their operations over such route, and that said Commission and its members and legal advisers have no jurisdiction or power of regulation over the same, and (2) to an injunction issued by a Three-Judge Federal District Court restraining said Commission and its members, employees, agents, and attorneys from in any manner interfering with such declared jurisdiction of the Civil Aeronautics Board or from in any way controlling or regulating said route?

All the points raised in the assignment of errors are also presented. The Question stated above sets forth the major issue.

STATUTES INVOLVED.

The following statutes are involved and are set forth in Appendix A hereto:

Section 20 and the first sentence of the second paragraph of Section 22 of Article XII and a portion of Section 1 of Article XXI of the California Constitution; portion of Sections 170 and 171 of the California Government Code, Sections 1701 through 1706, 1731, 1756 through 1767, and 2107 of the California Public Utilities Code (formerly Sections 53, 60, 61, 62, 64, 65, 66 (first and second sentences), 67, 68, 69, and 76(a) of the Public Utilities Act); Sections 1331, 1337, 1342, 2201, and 2281 of Title 28, United

States Code (62 Stats. 930, 931, 932, 964 as amended by 63 Stats. 105, and 968); Sections 1(2), 1(10), 1(21), 403, 404(a) and 404(b) of the Civil Aeronautics Act of 1938 (52 Stats. 977, 992, and 993, as amended), (49 U.S.C.A. 401(2), 401(10), 401(21), 483, 484(a), and 484(b), and Section 2(a)(2) and Section 4 of Chapter 65, Public Laws 31, 83rd Congress, the Submerged Lands Act.)

STATEMENT.

The appellee Catalina Air Transport, (formerly Wilmington-Catalina Airline, Ltd.), is a California corporation which on October 13, 1939, obtained a certificate of public convenience and necessity from the Civil Aeronautics Authority (now Civil Aeronautics Board) to operate as an air carrier between Wilmington on the mainland of California and Avalon on Santa Catalina Island. *Wilmington-Catalina Air, Grandfather Certificate,* 1 C.A.A. 431, (R. 35 and Plaintiffs' Ex. No. 3).

On July 22, 1941, the Civil Aeronautics Board extended the route of Wilmington-Catalina Airline, Ltd., to Los Angeles, authorizing the carrier to conduct operations between Los Angeles and Avalon via the intermediate point of Wilmington. This same order reflected the change of the carrier's name to Catalina Air Transport. *Catalina Air, Service to Santa Catalina Island,* 2 C.A.B. 798. (R. 35 and Plaintiffs' Ex. No. 3).

On June 3, 1946, the Civil Aeronautics Board approved an operating contract between appellee United Air Lines,

Inc., and Catalina Air Transport, dated March 7, 1946, under which United agreed to perform and discharge all of the obligations of Catalina Air Transport under the latter's certificate of public convenience and necessity. *United Air Lines, Operation of Catalina Air Transport*, 6 C.A.B. 1041. (R. 35 and Plaintiffs' Ex. No. 1).

None of the rates established by Catalina Air Transport or United Air Lines applicable to said route were ever filed with or approved by the appellant Commission (R. 36).

In the year 1951 there was an exchange of correspondence over the question of the jurisdiction of appellant Commission and the duty of United to file its tariffs with said Commission. Letters were exchanged between representatives of United Air Lines, Inc., and the Public Utilities Commission, said letters being dated, respectively, August 6, 1951; September 10, 1951; September 20, 1951; October 11, 1951; November 6, 1951; November 30, 1951; December 5, 1951; and December 27, 1951. Copies of said letters are attached hereto as Appendix B, and made a part hereof. (R. 37-46).

The appellant Commission now claims and asserts and from time to time in the past has claimed and asserted that the rates, fares and charges covering said operations, to the extent that such operations are not a part of interstate, foreign or overseas commerce as defined in Section 1(21) of the Civil Aeronautics Act of 1938 (59 U.S.C.A. 401(21)), i.e., to the extent such operations involve carriage of persons and property other than U.S. mail only

between points on the mainland of California and Santa Catalina Island, are entirely under the control and regulation of said appellant Commission, and that pursuant to the first sentence of the second paragraph of Section 22 of the California Constitution and Sections 1701 through 1706 of the California Public Utilities Code said appellant Commission has jurisdiction to establish such rates, fares and charges by requiring appellee air carriers to file tariffs with the appellant Commission (R. 36-46).

On February 27, 1952, a conference was held at which Mr. Treadwell and Mr. Laughlin, attorneys for appellee air carriers, and Mr. McKeage and Mr. Cline, attorneys for appellants, were present. Mr. Treadwell testified that at this conference Everett C. McKeage, Chief Counsel for appellant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission (R. 169-170). The findings proposed by appellee air carriers included a finding of fact that such advice had been so given. Appellants requested that such proposed finding be stricken on the ground that although the finding is supported by testimony of Mr. Treadwell it is not supported by the preponderance of the evidence (R. 51). The statements of counsel for appellants and the testimony of Mr. McKeage show that there was and is no intention on the part of the appellants to institute penalty actions against United by reason of its refusal to file tariffs covering its operations between Los Angeles-Long Beach and Avalon until after the jurisdictional question is finally settled and that they do not intend then to seek

any penalties except those which accrue after a contumacious refusal on the part of United to comply with a final order of the appellant Public Utilities Commission (R. 177-179, 182, 185-186, 197-198).

In this connection line 5 through line 27 on page 197 of the Record reads as follows:

> "Mr. Phelps. Q. I shall just ask the Judge [Witness McKeage] to describe what the position of the Commission, with respect to this Catalina operation, was prior to the bringing of this suit and what it is now.
>
> Mr. Treadwell. We object to that, your Honor, • • •
>
> Judge Orr. The objection is overruled.
>
> A. [Witness McKeage]. The intention—I can speak for myself, in the statutory duty that I perform, there was no intention on my part to bring penalty actions against this air carrier in connection with this Catalina operation. There was no intention on the part of the Commission to do so either. The only intention that was ever expressed was that if these rates were not filed that an order of investigation would be instituted where the question of jurisdiction would be determined in the orderly course of due process of law.
>
> We have never changed our position. That was our intent then. That is our intent now."

Furthermore, it is a matter of record that the action was not filed by appellee air carriers in the Federal District Court until June 25, 1952, almost four months after the conference of February 27, 1952 (R. 1). This would certainly indicate an absence of pressure on United rather than the threat of a penalty of $2,000 per day (R. 200).

The Three-Judge District Court struck the following from appellees' proposed finding 10 in adopting it as their own (R. 60 and Statement as to Jurisdiction 30):

> "• • • Subsequently, on February 27, 1952, the defendant Everett C. McKeage, Chief Counsel for the appellant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission."

On June 25, 1952, appellee air carriers filed their complaint in the United States District Court seeking declaratory relief and an injunction against appellants. Appellees' principal claim for relief is based on the allegation that appellants claim and assert that appellee United in failing to file its tariffs with appellant Commission has violated Section 2107 of the Public Utilities Code and that United has become liable for penalties in the sum of $2,000 per day for every such violation; that said Commission has threatened to bring suit to recover such claimed penalties unless said tariffs on the route in question are filed with said Commission. Appellee air carriers claim that such penalties are unconstitutional under the Fourteenth Amendment of the Federal Constitution and that appellant Commission has no authority to compel said appellees to file tariffs covering operations over the route in question because exclusive jurisdiction over such route is vested in the Civil Aeronautics Board under the Civil Aeronautics Act (R. 1-8 and 10-11).

The Civil Aeronautics Board, as intervenor, filed a complaint in this proceeding in which it claims that it has

exclusive jurisdiction over the operations in question under the terms of the Civil Aeronautics Act (R. 22-26).

The Three-Judge District Court was convened because appellee air carriers claim that the penalty provisions of Section 2107 of the California Public Utilities Code are in violation of the Constitution of the United States (R. 13). The District Court did not reach nor decide the question presented as to the constitutionality of the penalty provisions, but stated that if the cause required the resolution of no other federal issue, obviously the court could dissolve itself (R. 48 and 61). It did, however, conclude that a substantial question would have been presented as to the constitutionality of the penalty provision, if reached (R. 62).

The District Court found that the statutes of the State of California provide for penalties up to and including $2,000 for each day that operations are conducted by carriers without effective tariffs being on file with the appellant Public Utilities Commission, and that the refusal of United heretofore to comply with the directives of the appellant Commission to file tariffs, and any refusal to comply with any future such directive, has subjected and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. The District Court further found that apart from these risks, United is confronted with the necessity of incurring the expenditures (in excess of $3,000) incident to defending a proceeding certain to be

instituted before the appellant Commission unless this Court resolves the controversy presented (R. 60-61).

The District Court found that Santa Catalina Island is an island located in the Pacific Ocean, and is a part of the State of California. The distance between the shorelines of the island and of the mainland of California is thirty miles (R. 36 and 58).

The District Court concluded that the intervening waters between the three-mile marginal belts along the coastline of the mainland of the State of California, and surrounding Santa Catalina Island, are wholly outside the territory and jurisdiction of the State of California, and that aircraft passing over these intervening waters are passing through air space over a place outside of the State of California (R. 63). The District Court further concluded that appellee air carriers' operations between Santa Catalina Island and the mainland of the State of California constitute interstate air transportation as defined by the Civil Aeronautics Act of 1938, and the powers conferred upon and exercised by the Civil Aeronautics Board leave no room for State regulation of these operations (R. 63-64).

On January 28, 1953, the Three-Judge District Court (1) entered a declaratory judgment against appellants decreeing that the Civil Aeronautics Board has exclusive jurisdiction over appellee air carriers in their operations over the route between the mainland of California and Santa Catalina Island, and that the Public Utilities Commission of the State of California and its members and legal advisers, appellants herein, have no jurisdiction or

power of regulation over the same, and (2) issued an injunction permanently restraining the appellant Commission and its members, employees, agents, and attorneys from in any manner interfering with such paramount jurisdiction of the Civil Aeronautics Board or from in any way controlling or regulating said route (R. 65-67).

The motion for new trial filed by appellants February 6, 1953, was heard February 19, 1953, and was denied February 20, 1953 (R. 68-80, 237-262, 104).

The case is now before this Court on direct appeal.

SPECIFICATION OF ERRORS.

The appellants rely upon and urge the following assigned errors in their appeal from the final judgment of the Three-Judge District Court.

The Three-Judge District Court erred:

1. In finding that aircraft flying between Avalon and Wilmington were required to fly over approximately 24 miles of water not within the boundaries of the State of California.

2. In finding that the tariffs and operations of Wilmington-Catalina Airlines, Ltd., and its successor Catalina Air Transport, and of United Air Lines have been and are being conducted under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board.

3. In finding that the statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that operations are conducted by

carriers without effective tariffs being on file with the appellant Commission and in finding that appellants in the past have asserted that these statutory penalties are applicable to air carriers, and have caused proceedings to be instituted in the California Courts for the recovery of these penalties against various air carriers, including appellee United.

4. In finding that the refusal of the appellee United to comply with directives of the appellant Commission to file tariffs, and any refusal to comply with any future such directive, has subjected and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for recovery of penalties.

5. In concluding that the District Court has jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1337, and 28 U.S.C. 2201.

6. In concluding that the Civil Aeronautics Board is entitled to seek and obtain a ruling as to its powers and jurisdiction as an intervenor in this case, and to obtain declaratory and injunctive relief against any interference by the appellants with its jurisdiction.

7. In concluding that the appellees raised a substantial Federal question concerning the constitutionality of the penalty provisions contained in Section 2107 of the California Public Utilities Code and that this Three-Judge District Court was properly convened.

8. In concluding that the institution of an investigation proceeding before appellant Commission would subject

appellee air carriers and possibly the public to irreparable injury and would constitute a burden on interstate commerce and an interference with the jurisdiction of the Civil Aeronautics Board.

9. In concluding that the threat of institution of an investigation proceeding, the risks and expenditures to which appellee air carriers may be subjected as a result of possible penalty actions, and the actual controversy which exists between the parties are such as to entitle the appellees to declaratory relief and injunctive relief.

10. In concluding that appellees have no plain, speedy, and efficient remedy in the Courts of the State of California, or otherwise, than by this action.

11. In concluding that the matter in issue concerns the reach of a Federal statute which conflicts with the claims of the appellants regarding state law.

12. In concluding that this Three-Judge District Court should decide the issues tendered irrespective of the existence or adequacy of any state court remedies.

13. In concluding and holding that the intervening waters between the 3-mile marginal belts along the coast line of the mainland of the State of California and surrounding Santa Catalina Island are wholly outside the territory and jurisdiction of the State of California, and that aircraft passing over these intervening waters are passing through air space over a place outside of the State of California.

14. In concluding that the Congress through the adoption of the Civil Aeronautics Act of 1938 has declared

therein that all common carrier transportation by aircraft between places in the same State when that transportation involves passage through or over territory or waters outside the State constitutes interstate air transportation.

15. In concluding that appellee air carriers' operations between Santa Catalina Island and the mainland of the State of California constitute interstate air transportation as defined by the Civil Aeronautics Act of 1938, and that the powers conferred upon and exercised by the Civil Aeronautics Board leave no room for State regulation of these operations.

16. In concluding that the appellees are entitled to a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the appellee air carriers in their operations between the mainland of California and Santa Catalina Island, and permanently forbidding and enjoining appellants from, in any manner, interfering with such exclusive jurisdiction.

17. In ordering, adjudging, and decreeing that the Civil Aeronautics Board has exclusive jurisdiction over the appellee air carriers in their operations over the route described in the complaint, and the appellants have no jurisdiction or power of regulation over the same.

18. In permanently prohibiting and enjoining appellants and their employees, agents, and attorneys, and all persons claiming by, through or under them, from in any manner interfering with the exclusive jurisdiction of the Civil Aeronautics Board over the appellee air carriers in their

operations over the route described in the complaint, or from in any way controlling or regulating said route.

19. In failing to find and conclude that no actual case or controversy such as will entitle appellees to the relief requested in the Federal District Court exists.

20. In failing to find and conclude that appellees are subject to no threat of irreparable injury, which will entitle them to the relief requested in the Federal District Court.

21. In failing to find and conclude that appellees have failed to raise a substantial Federal question concerning the constitutionality of the penalty provisions contained in Section 2107 of the California Public Utilities Code and in failing to dissolve the Three-Judge District Court because of appellees' failure to raise such substantial Federal constitutional question.

22. In failing to find and conclude that the administrative processes of appellant Commission and the administrative remedies available to appellees have not been exhausted and, therefore, appellees are not entitled to the relief requested in their respective complaints, and that said Court has no jurisdiction to entertain the same.

23. In failing to find and conclude that the appellees have a plain, speedy, and efficient remedy before appellant Commission and the courts of the State of California and, therefore, the appellees are not entitled to the relief requested in their respective complaints.

24. In failing to find and conclude that the waters between the California mainland and Santa Catalina

Island are not a place outside the State of California within the meaning of the definition of interstate air transportation as set forth in the Civil Aeronautics Act of 1938.

25. In failing to find and conclude that air transportation between the California mainland and Santa Catalina Island is not interstate air transportation within the meaning of the Civil Aeronautics Act of 1938.

26. In failing to find and conclude that the Congress through the adoption of the Civil Aeronautics Act of 1938 has not preempted the field of regulation of air transportation between places in the State of California when that transportation involves passage through the air space over the high seas.

27. In failing to conclude that the Johnson Act, 28 U.S.C.A. 1342, precludes this Three-Judge District Court from issuing an injunction restraining appellant Commission from issuing directives and orders affecting the rates in question.

28. In failing to dissolve the temporary injunction outstanding against appellants and in failing to dismiss the complaints of appellees on file herein.

SUMMARY OF ARGUMENT.

The law of the State of California does not of itself require appellee air carriers to file tariffs covering their operations in question. It authorizes the State Commission to establish rates therefor.

The letters from the Secretary of the State Commission directing United to file tariffs are the beginning of the

administrative process. They are not directives which may be enforced through contempt proceedings, penalty actions, or otherwise.

By refusing to file such tariffs United has subjected itself only to the probability that an order of investigation will be instituted by the State Commission in which a formal determination will be made as to whether the State Commission has jurisdiction in the premises. The expense to which appellee air carriers may be put in appearing before the State Commission in such a proceeding does not constitute such irreparable injury as will entitle them to relief. The expense and annoyance of litigation is a part of the social burden of living under government.

Formal decisions and orders of the State Commission are issued after consideration of the evidence and arguments presented at a formal hearing and need not reaffirm the position taken by its Chief Counsel or in prior administrative letters from its Secretary.

The law imposes no penalty upon appellee air carriers for failure to file tariffs with the State Commission until they have been effectively ordered to do so in a formal proceeding. Appellants have made no threats to and will not seek to impose penalties upon appellee air carriers for refusal to file tariffs of the rates in question prior to such an effective order.

Appellees' concern regarding federal penalties is premature. The State Commission may establish the same rates that have been authorized by the Civil Aeronautics Board. Appellee air carriers will not be subject to penalty

under the Federal law if they apply intrastate rates to intrastate traffic. The fact that appellee air carriers claim they fear the imposition of penalties under Federal law does not prove that such fear is justified or based upon a reasonable interpretation of that law.

No case or controversy exists which entitles appellees to a declaratory judgment or equitable relief in any court until the administrative process has been exhausted.

The provisions of the Johnson Act prohibit the Federal District Court from enjoining the State Commission from establishing rates for the transportation in question.

The provisions of the Constitution of the State of California under which the State Commission claims jurisdiction over appellee air carriers pertain only to rates, fares and charges. The State Commission has never claimed jurisdiction over any other aspect of appellee air carriers' operations. Clearly in so far as the judgment of the Three-Judge Federal District Court restrains appellants from asserting jurisdiction over matters other than rates, fares and charges, it is not supported by the evidence and is in error.

As no substantial question regarding the validity of a state law under the Federal Constitution has been raised by appellees, the Three-Judge Federal District Court should have dissolved itself.

The Federal District Court was without jurisdiction to decide the case upon its merits.

The laws of the State of California provide for adequate relief from enforceable orders of appellant Commission

through review by the Supreme Court of California. Such review results in a final determination of all questions of State law. If the State Supreme Court resolves questions of State law against the State Commission *no appeal can be taken.* In the event the State Supreme Court sustains the validity of an order of the State Commission, where a substantial question respecting its validity has been raised under the Federal Constitution, treaties, or laws, a direct appeal can be taken to this Court. Neither public nor private interest will suffer. All questions of State and Federal law will be finally resolved by the appropriate tribunals and needless friction between State and Federal governments will be avoided.

In the present case the Federal District Court has made determinations respecting the law of the State of California. If this Court decides this case on the merits it also will make determinations respecting the State law. Conceivably both the lower Federal Court and this Court could improperly decide the State issues. In such event eitner the public or private interest will irreparably suffer.

The Federal District Court should have refused to issue a declaratory judgment because the declaratory complaints set forth a claim of right under the Federal law which in reality is in the nature of a defense to the action proposed by the State Commission under the State law.

The Federal District Court should have exercised its discretionary power to withhold equitable and declaratory relief in this case.

The waters between the mainland of California and Catalina Island are within the boundaries of and are a

part of the State of California. Intrastate rates of air carriers are subject to regulation by the State Commission and not by the Civil Aeronautics Board.

The regulation of the rates in question is a matter of local concern to the people of the State of California. Should this Court determine that a portion of the intervening waters between the mainland of California and Catalina Island is not within the geographical boundaries of the State of California, such waters are nevertheless within the jurisdiction of the State of California. As such waters are not outside the jurisdiction of the State of California the air carriage here under consideration does not pass *through air space over any place outside thereof* within the meaning of the provision of the Civil Aeronautics Act defining interstate air transportation. Through the enactment of the Civil Aeronautics Act the Congress intended to provide for the regulation of those rates of air carriers which could not be effectively regulated by the states. It did not intend to supersede effective state regulation.

Upon consideration of the merits of this case the Federal District Court should have declared that the rates in question are subject to the jurisdiction of the State Commission and should have dissolved the temporary injunction.

ARGUMENT.

I.

THE FEDERAL DISTRICT COURT HAD NO JURISDICTION TO DECIDE THE CASE ON ITS MERITS.

A. The California Constitution authorizes the State Commission to establish rates for common carriers. No provision of the State law requires air carriers to file tariffs with the State Commission prior to the issuance of an order by the State Commission pursuant to the procedural provisions of the California Public Utilities Code.

Appellee air carriers have made no reference to any provision in the constitution and statutes of the State of California which requires them to file tariffs with the State Commission, for there is none.

Section 22 of Article XII of the California Constitution authorizes the State Commission to establish rates for transportation by air carriers within the jurisdiction of the State. Pursuant to this provision, the State Commission may establish such rates by authorizing or ordering air carriers to file tariffs with said Commission:

> *United Air Lines, Inc., et. al.*, 50 Cal. P.U.C. 563 (1951); review denied, *United Air Lines v. Commission*, 37 A.C. 633, 1 (1951); appeal dismissed, *United Air Lines v. Commission*, 342 U.S. 908 (1952).

B. The letters from the Secretary of the Commission instructing United to file its tariffs were not issued pursuant to the procedural provisions of the Public Utilities Code and are not orders of the State Commission which may be enforced by contempt proceedings, or penalty actions brought pursuant to Section 2107 of the California Public Utilities Code, or otherwise.

Appellee air carriers state that prior to the trial of the case the State Commission gave no indication that it

did not consider its letters to appellees to be final administrative orders and determinations. The explanation is obvious. Prior to the trial of the case appellants had no thought that anyone would construe the letters from the Commission Secretary to be final administrative orders and determinations.

We can only ask why appellants needed to have informed appellee air carriers that the letters from the Commission Secretary were not to be construed as final administrative orders and determinations when appellee air carriers themselves, both priorly and subsequently to the trial of this matter, declared such to be the case?

The record shows that appellee air carriers were not misled by the letters from the Commission Secretary here under consideration.

We quote from the transcript of the hearing for preliminary injunction, August 8, 1952 (R. 142):

> "Judge Orr. It is our thought, Mr. Treadwell, that right now your job is to convince us that this is the proper forum to bring this action before.
>
> Mr. Treadwell. Oh, yes, I will be glad to do that.
>
> Judge Orr. We are more concerned about that right now than any other phase of the case.
>
> Mr. Treadwell. Well now, the situation is this, your Honor, on that: If the Public Utilities Commission had made some order which controls this route, undertook to control the route, there is no doubt that the proper procedure would be a writ of review from that order to the Supreme Court of the United States [California]. That would be what would be the actual way to proceed, the way you could proceed.
>
> But there is nothing of that kind here. There is no order. We have waited now a minimum of six years,

and probably much longer, according to the allegation of the complaint * * *"

We also quote from another portion of the same transcript, Mr. Treadwell speaking (R. 151):

"* * * if the Commission only threatened something, if they actually had done something, if they actually had done something, our remedy of course would be to go to the Supreme Court on a writ of review."

As recently as February 19, 1953, appellee air carriers in their answer to appellants' motion for new trial in comparing the facts of *Public Service Commission of Utah v. Wycoff*, 344 U.S. 237 (1952), with those of the case here under consideration, stated regarding the present case (R. 98):

"There was no litigation pending, nor was there any existing administrative action concerning the route at the time the suit was commenced."

In order that administrative procedure accomplish its objective it, unlike judicial procedure, must be flexible. One of the most efficient and time-saving features of administrative procedure is the administrative letter which is signed by the Secretary of the Commission. Such letters usually proceed from informal investigations made by the staff of the Commission, the results of which investigations are presented to the Commission.

Where the information presented so justifies, the Commission authorizes the sending of a letter, signed by the Secretary of the Commission, calling to the attention of the utility that it appears that such utility is violating the law and directing corrective measures to be taken.

This procedure is constantly invoked and puts the utility upon notice as to the claimed violation of law with the hope that corrective measures will be taken and a formal proceeding will be obviated. If the utility refuses to comply, the next step is to institute a formal investigation where the procedure is substantially the same as in a judicial proceeding and out of which a formal decision is issued. The administrative letter is the first step in the administrative process.

It would be inefficient and unnecessarily time consuming to institute a formal proceeding in every case where a utility appears to be violating the law for the reason that most of these infractions are remedied after the same has been called to the attention of the utility by an administrative letter. Furthermore, in fairness to a utility, it should be given an opportunity, informally, to correct a situation before it has recorded against it a formal complaint issued by the Commission.

The utility is presumed to know the law and that an administrative letter is not a decision of the Commission within the contemplation of the law of the State of California.

C. The institution of an investigation before the State Commission to determine whether it should establish rates for the transportation in question will not subject appellees to such irreparable injury as will entitle them to declaratory and injunctive relief even though appellee air carriers may expend sums in excess of $3,000 in responding to such investigation.

Appellee air carriers claim and the District Court has concluded that a case or controversy exists under Section 1331 of the Judicial Code, 28 U.S. Code 1331, wherein the

sum of more than $3,000 is involved because the sums which appellee air carriers will expend if required to respond to an investigatory proceeding before the State Commission will exceed $3,000 (R. 60 and 62). Just as illogically the air carriers could contend that there is a case or controversy involving over $3,000 because the parties have expended and will expend aggregate sums considerably in excess of $3,000 in prosecuting and defending the present action in the Federal District Court and the United States Supreme Court, and also in the United States Court of Appeals where appellants have taken a precautionary appeal.

Appellees actually may incur greater expenditures by reason of their seeking to have the issues determined first in the Federal courts instead of permitting the administrative process to take its course.

The sums which appellee may expend in any forum do not constitute the subject matter of this action nor do they constitute such irreparable injury as will entitle them to equitable relief. As this Court has previously stated, "• • • the expense and annoyance of litigation is a price citizens must pay for life in an orderly society • • •", *Poulos v. New Hampshire*, 345 U.S. 395, 409, 97 L.ed. (Adv. Op.) 702, 710.

Petroleum Exploration, Inc. v. Public Service Commission of Kentucky, 304 U.S. 209, 220-222, 82 L.ed. 1294, 1302-1303;

Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 51-52, 82 L.ed. 638, 644-645.

D. Formal decisions of the State Commission are issued after consideration of the evidence and arguments presented at the formal hearing and need not necessarily reaffirm the position taken by its Chief Counsel or in prior administrative letters from its Secretary.

Who can say what decision will emanate from the State Commission if the facts and legal issues are presented to it for determination at a formal hearing? Certainly the Commission is not bound by prior administrative letters or by the opinions of its Chief Counsel in deciding matters under consideration before it. It renders its own decision after due deliberation upon the matters presented at the hearing. On many occasions the Commission has modified and reversed its own decisions in the light of evidence and arguments presented for consideration on rehearing.

The fact that an administrative agency or one of its hearing officers may have formed and expressed an opinion officially as to a case does not disable such agency or officer from hearing the same. So long as the party affected has an opportunity fully to present his position at the hearing, due process will be accorded.

National Labor Relations Board v. Pittsburgh Steamship Co., 337 U.S. 656, 659, 93 L.ed. 1602, 1606;

Federal Trade Commission v. Cement Institute, 333 U.S. 683, 700-703, 92 L.ed. 1010, 1034-1035;

National Labor Relations Board v. Donnelly Garment Co., 330 U.S. 219, 236-237, 91 L.ed. 854, 867.

E. The law of California imposes no penalty upon appellee air carriers for failure to file tariffs with the State Commission until said Commission effectively orders them to do so in a formal proceeding. Appellants have made no threats to and will not seek to impose penalties upon appellee air carriers for refusal to file tariffs of the rates in question prior to the issuance of such an effective order.

As previously stated no provision of the California law of itself requires air carriers to file tariffs with the State Commission. If the injunction issued by the Federal District Court is dissolved the State Commission will probably institute an investigation before itself in accordance with the procedures established in Sections 1701 through 1706 of the Public Utilities Code. If the Commission determines that it has jurisdiction it will proceed to establish rates covering the transportation in question or will order appellee air carriers to file tariffs of its rates for such transportation.

Only after a formal order of the Commission requiring appellee air carriers to file tariffs has become final will said air carriers be subject to the provisions of Section 2107 of the Public Utilities Code by reason of refusal thereafter to file tariffs.

The letters from the Secretary of the Commission contain no threats that appellants will institute penalty actions if the tariffs are not filed. We have previously pointed out in the Statement in this brief that the record shows appellants have made no such verbal threats (R. 197, 200).

Finding 11 of the District Court states that appellants disclaim any intention of instituting proceedings to recover penalties against appellee United for its failure to file tariffs with the Commission unless and until such time as

United fails to file its tariffs with appellant Commission after having been formally ordered to do so in a proceeding instituted before the Commission for the purpose of ascertaining jurisdiction (R. 60).

Finding 12 states that appellants in the past have caused proceedings to be instituted in the California courts for the recovery of penalties against various air carriers, including appellee United, in other cases wherein disputes have existed concerning the regulatory jurisdiction of the State Commission (R. 61).

A brief summary of the facts and the considerations which led the State Commission to institute the penalty action against appellee United will disclose matters *which are entirely dissimilar and not present in the case here under consideration* (R. 171).

Prior to March 1, 1951, United had tariffs on file with the Public Utilities Commission covering its coach fares between San Francisco and Los Angeles, and these fares were thereby established by the Commission under Section 22 of Article XII of the California Constitution.

United, prior to March 1, 1951, applied to the Public Utilities Commission for authorization to increase such coach fares on March 1. The Commission refused to grant the application because insufficient information had been furnished. Nevertheless, on March 1, United increased its fares without the necessary authorization from the Commission.

After the institution by the Commission of a formal investigation and public hearing the Commission issued its Decision No. 45624, 50 P.U.C. 563, effective May 9,

1951, authorizing United to increase its fares and ordering United to make reparation of the excess fares collected between March 1 and May 8, 1951, inclusive. A petition for writ of review of this decision was filed with the California Supreme Court. The writ was denied. *United Air Lines v. Commission*, 37 A.C. 633, 1(1951). The appeal to this Court was dismissed on the ground that no substantial Federal question was involved. *United Air Lines v. Commission*, 342 U.S. 908 (1952).

Subsequently, the People of the State of California filed a penalty action against United under Section 2107 of the California Public Utilities Code. This proceeding was filed because United, in violation of the provisions of Sections 20 and 22 of Article XII of the California Constitution, had charged during the period March 1 through May 8, 1951, fares in excess of those established and authorized by the Commission.

Do the above essential facts exist in the present case? The answer is an unequivocal *no!* The Commission has made no claim that appellee air carriers have charged fares in excess of those established and authorized by the Commission, but, on the contrary, admits that no fares covering appellee air carriers' Catalina operations have been established by the Commission. Appellants are here asserting only that they should be permitted to institute a proceeding before the Commission for the purpose of determining whether rates covering appellee air carriers' Catalina operations should be established pursuant to Section 22 of Article XII of the California Constitution.

F. There is no evidence in the record and consequently no finding that the State Commission will establish rates for appellee United covering the operations in question different from the rates already established in its tariffs on file with the Civil Aeronautics Board. Consequently, appellees' concern regarding federal penalties is premature. Appellee air carriers will not be subject to penalty under the Federal law if they apply intrastate rates to intrastate traffic.

Appellee United's concern over Federal penalties is premature.

If the Commission establishes the same rates as have been established in tariffs on file with the Civil Aeronautics Board, appellee air carriers have no problem respecting penalties. If the Commission establishes different rates, its order may be stayed until the jurisdictional questions are resolved.

In any event, no controversy can arise until the Commission has taken appropriate administrative action establishing rates for appellee air carriers' Catalina operations.

As the State Commission regulates intrastate rates and the Civil Aeronautics Commission regulates interstate rates there is no requirement that the rates established by the State agency be the same as those established by the Federal agency. Appellee air carriers will not be subject to any penalty under the Federal law if they apply intrastate rates to intrastate traffic even though such rates be different from the interstate rates established between the same points. The fact that appellee air carriers claim they fear the imposition of penalties under Federal law does not prove that such fear is justified or based upon a reasonable interpretation of that law.

G. The exhaustion of the administrative processes before the State Commission is a condition precedent to the exercise of jurisdiction by the Federal District Court.

Appellee air carriers have brought this action to guard against the possibility that the State Commission in the exercise of its administrative authority will establish rates for the transportation in question. Appellees ask that they win any such case before it is commenced.

In *Public Service Commission of Utah v. Wycoff*, 344 U.S. 237, this Court has stated on pages 246-248:

> "Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. Cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Eccles v. Peoples Bank*, 333 U.S. 426. See *Colegrove v. Green*, 328 U.S. 549. Responsibility for effective functioning of the administrative process can not be thus transferred from the bodies in which Congress has placed it to the courts.
>
> "But, as the declaratory proceeding is here invoked, it is even less appropriate because, in addition to foreclosing an administrative body, it is incompatible with a proper federal-state relationship. The carrier, being in some disagreement with the State Commission, rushed into federal court to get a declaration which

either is intended in ways not disclosed to tie the Commission's hands before it can act or it has no purpose at all.

"Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be res judicata, so that the Commission can not hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

"The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right."

We were surprised to find counsel for the Civil Aeronautics Board arguing in the Federal District Court that to permit appellee air carriers to submit to a formal proceeding to be instituted by the State Commission would subject them to such irreparable injury as to entitle them to equitable relief in the Federal District Court (R. 214-217). Put the shoe on the other foot. Suppose United claimed that the transportation in question was intrastate rather than interstate and the Civil Aeronautics Board were seeking to require United to obtain a certificate of public convenience and necessity and file tariffs of its rates and charges. Would the Civil Aeronautics Board contend and would the Federal District Court hold that the Federal Court in an application for an injunction by United should determine the jurisdictional question of whether the transportation were intrastate or interstate prior to the exhaustion of the administrative process? We think not. *Federal Power Com. v. Arkansas Power and Light Co.*, 330 U.S. 802, 803, 91 L.ed. 1261, where this Court held that the administrative processes of the Federal agency must first be exhausted, is a good illustration of this point.

In *Tobin v. Banks & Rumbaugh*, 201 F.2d 223, the Court of Appeals held that Section 6(c) of the Administrative Procedure Act authorizing the court to enforce administrative subpoena to the extent it is "in accordance with law," does not require the court in a proceeding under the Fair Labor Standards Act seeking the enforcement of investigative subpoena first to determine that employment within the meaning of the statute is covered. The employer had urged that the court should determine

whether the employer and the subject matter to which the subpoena is directed are covered by the Act.

The Court of Appeals, 201 F.2d 223, 226, in following the rule laid down in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507-510, made the following appropriate statement:

> "* * * To give effect to (the employer's) contention would, in most instances, sterilize the investigative powers of the Administrator and force him to trial without the benefit of the very evidence which the subpoena is designed to secure. Refusal of the courts to refrain from adjudicating the issue of coverage in the enforcement proceeding would result in a maelstrom of confusion, for by their refusal to permit investigation, employers would be enabled to secure a premature judgment on that issue and the very evil which Congress sought to overcome would prevail over the guardian appointed to correct it."

We also quote from *Myers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50-52, 82 L.ed. 638, 644-645:

> "Third. The corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board. So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judi-

cial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.

"Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

The following cases also support the rule that the administrative process must be exhausted:

Federal Power Commission v. Arkansas Power and Light Company, 330 U.S. 802, 803, 91 L.ed. 1261;

Macauley v. Waterman S. S. Corporation, 327 U.S. 540, 543-545, 90 L.ed. 839, 841-843;

Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507-510, 87 L.ed. 424, 428-430;

Rochester Telephone Corporation v. United States, 307 U.S. 125, 130; 83 L.ed. 1147, 1152.

The cases cited in the opinion of the Federal District Court may be distinguished. Neither in *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, nor *Cloverleaf Co. v. Patterson,* 315 U.S. 148, was a Three-Judge District Court invoked and in neither case was the issue of exhaustion of the administrative process raised. The case of *Public Utilities Commission of Ohio v. United Fuel Gas Co.,* 317 U.S.

456, may be distinguished from the case now before the Court for the following reasons: (1) In the *United Fuel Gas Company* case the administrative process had been exhausted, and (2) the *United Fuel Gas Co.* case had been pending in the Federal courts over seven years at the time of the argument before this Court, and the majority was of the opinion that the matter should be finally disposed of after such an undue length of time.

We also quote from page 245 of the *Wycoff* case, 344 U.S. 237, previously referred to:

> "* * *, this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment. If there is any risk of suffering penalty, liability or prosecution, which a declaration would avoid, it is not pointed out to us. * * *"

The issuance of a rate order by the State Commission establishing rates for the transportation in question would be the exercise of legislative authority delegated to the Commission. Such a legislative order has not yet been issued. Nevertheless, appellees urge and the Federal District Court has declared that the State Commission has no power even to consider the establishment of such rates, in a formal proceeding instituted before itself pursuant to the provisions of the California Public Utilities Code. We again urge that this Court not permit the quasi-legislative processes under which the State Commission functions to be so subverted.

We also wish to point out that the subpoena power of an administrative agency is broader than that of a court. Its powers are like those of a grand jury. It is not necessary that a case or controversy exist. The investigatory proceedings may be instituted to determine if one does exist.

U. S. v. Morton Salt Co., 338 U.S. 632, 641-644, 94 L.ed. 401, 410-411.

H. The provisions of the Johnson Act prohibit the Federal District Court from enjoining the State Commission from establishing rates for the transportation in question.

Under certain circumstances the provisions of the Johnson Act, Section 1342 of Title 28, U.S. Code (28 U.S.C.A. 1342) prohibit Federal District Courts from enjoining the operation of, or compliance with, orders of state regulatory commissions affecting rates. The provisions of the Johnson Act are fulfilled in the instant case.

1. The jurisdiction of the Three-Judge District Court, if it exists, rests solely on the repugnance to the Federal Constitution of the penalty provisions of the California Public Utilities Code through which appellees claim the State Commission will force appellee air carriers to file tariffs and thereby establish the rates; and,

2. An order of the State Commission establishing rates for the transportation in question will not interfere with interstate commerce; and,

3. Such order, if issued, will be made in a formal investigatory proceeding before the State Commission after reasonable notice and hearing; and,

4. A plain, speedy and efficient remedy may be had in the Supreme Court of California to review any such order which may be issued by the Commission.

I. In so far as the judgment of the Federal District Court pertains to matters other than the establishment and regulation of rates, fares, and charges for transportation over the route in question, it is not supported by the record and is in error.

The provisions of the Constitution of the State of California under which the State Commission claims jurisdiction over appellee air carriers pertain only to rates, fares, and charges. Appellants have never claimed jurisdiction over any other aspect of appellee air carriers' operations. In so far as the judgment of the Federal District Court pertains to matters other than the establishment and regulation of rates, fares and charges of appellee air carriers, it is not supported by the record and is clearly in error.

This Court will note that appellee air carriers, in their statement in opposition to our jurisdictional statement, have made no comment regarding the claim that the judgment of the Federal District Court is too broad in its scope.

J. As there is no substantial question involved in this case concerning the validity under the Federal Constitution of Section 2107 of the California Public Utilities Act, the Three-Judge Federal District Court should have dissolved itself.

No claim or assertion of right has been made by the State Commission against appellee air carriers under Section 2107 of the Public Utilities Code by reason of United's failure to file tariffs covering the operations in

question. Therefore, there is no substantial question concerning the validity of Section 2107 under the Federal Constitution. The Three-Judge District Court should have so found and dissolved itself as the jurisdictional requirements of 28 U.S.C. 2281 are not met.

California Water Service Co. v. City of Redding, 304 U.S. 252, 82 L.ed. 1323;

City of Springfield v. U. S., 99 F.2d 860, cert. den. 306 U.S. 650, 83 L.ed. 1049;

Bowles v. Case, 9 Cir., 149 F.2d 777, affirmed 327 U.S. 92;

Ex parte Bransford, 310 U.S. 354;

Cf. *Farmers Gin Co. v. Hayes*, 54 Fed. Supp. 43;

Penn Greyhound Lines v. Board of P.U. Comrs., 107 Fed.Supp. 521.

The administrative process has not been exhausted. No case or controversy exists, and appellees are subject to no irreparable injury, which entitles them to judicial relief.

The Johnson Act precludes the issuance of the injunction to the extent that it pertains to rates, and, in so far as the judgment below affects matters other than rates, it is too broad in its scope and is in error. As no substantial question has been raised regarding the validity of Section 2107 of the California Public Utilities Code, the Three-Judge District Court should have dissolved itself. The three judges sitting as a Federal District Court also were without jurisdiction to decide the case upon its merits.

II.

THE FEDERAL DISTRICT COURT SHOULD HAVE EXERCISED ITS DISCRETIONARY POWER TO WITHHOLD EQUITABLE AND DECLARATORY RELIEF IN THIS CASE.

A. An adequate remedy exists in the courts of the State of California for the purpose of reviewing any order issued by the State Commission pertaining to the subject matter of this action.

Appellee air carriers assert that Section 20 of Article XII of the Constitution of California limits judicial review of rate action by appellant Commission to questions of confiscation, and claim that since the review is so limited it is inadequate for the controversy here involved.

We wish to point out to this Court that Section 20 of Article XII of the California Constitution is not involved in this proceeding. No application to increase rates or charges for the transportation in question has been filed by appellee air carriers with appellant Commission.

Section 20 reads as follows:

> "No railroad or other transportation company shall raise any rate or charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances whatsoever, except upon a showing before the railroad commission [now Public Utilities Commission] provided for in this Constitution, that such increase is justified, and *the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property.*" (Emphasis added.)

The above-quoted limitation is on judicial review of a Commission decision upon a showing whether an increase in rates is justified, not on a Commission decision on the question whether it has jurisdiction to establish rates for a carrier.

This Court will note that appellee United had no hesitancy in urging review of jurisdictional matters in its recent appeals from Commission Decision No. 45624, *United Air Lines, et al.*, 50 Cal. P.U.C. 563 (1951), to the California Supreme Court and to the United States Supreme Court, supra. We are confident that both courts had no hesitancy in considering on their merits the jurisdictional questions raised by United. It is preposterous for appellee air carriers to urge before this Court that they are precluded under California law from obtaining effective judicial review of rate action taken by appellant Commission when no issue of confiscation, but only issues relating to jurisdiction, are involved.

Sections 1756 through 1767 of the California Public Utilities Code not only provide adequate, but also preferred, judicial review of orders and decisions of the State Commission. If, as appellees state, their remedies in the California courts are *niggardly*, it is because of the questionable merits of their case and not because inadequate provision has been made under the California law for judicial review.

Review of a State Commission decision by the California Supreme Court results in a final determination of all questions of State law. If the State Supreme Court resolves questions of State law against the State Commission *no appeal can be taken.* Even if questions of Federal

law are resolved against the State Commission by the State Supreme Court the State Commission will be far less likely to appeal from such adverse decision than from a similar decision from a lower Federal court. In the event the State Supreme Court sustains the validity of an order of the State Commission, where a substantial question respecting its validity has been raised under the Federal Constitution, treaties, or laws, a direct appeal can be taken to this Court. Neither public nor private interest will suffer. All questions of State and Federal law will be finally resolved by the appropriate tribunals and needless friction between State and Federal governments will be avoided.

In the present case the Federal District Court has made determinations respecting the law of the State of California. If this Court decides this case on its merits it also will make determinations respecting the State law. Conceivably both the lower Federal Court and this Court could improperly decide State issues. In such event either the public or private interest will irreparably suffer.

In support of our position that the Federal District Court should have refused to grant relief in this case, we quote from *Alabama Commission v. Southern Railway*, 341 U.S. 341, 349-351, 95 L.ed. 1002, 1009:

> "* * * Equitable relief may be granted only when the District Court, in its sound discretion exercised with the 'scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts,' is convinced that the asserted federal right cannot be preserved except by granting the 'extraordinary relief of an injunction in the federal courts.' Considering that 'few public interests

have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies,' the usual rule of comity must govern the exercise of equitable jurisdiction by the District Court in this case. * * *

"'This withholding of extraordinary relief by courts having authority to give it is not a denial of the jurisdiction which Congress has conferred on the federal courts. * * * On the contrary, it is but a recognition * * * that a federal court of equity * * * should stay its hand in the public interest when it reasonably appears that private interests will not suffer. * * *

"'It is in the public interest that federal courts of equity should exercise their discretionary power to grant or withhold relief so as to avoid needless obstruction of the domestic policy of the states.'"

We also rely on the language previously quoted from pages 246-248 of the *Wycoff* case, 344 U.S. 237, 97 L.ed. (Adv. Ops.) 176, and on *Alabama Public Service Commission v. Southern Railway*, 341 U.S. 363, 365-366, 95 L.ed. 1016, 1019.

Congress in enacting the Johnson Act (28 U.S.C. 1342), previously referred to, and Section 265 of the Judicial Code, now 28 U.S.C. 2283, which provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

has given recognition to the problems arising from the Federal-State relationship.

In *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 141, 86 L.ed. 100, 109, this Court states:

> "Section 265 is not an isolated instance of withholding from the federal courts equity powers possessed by Anglo-American courts. As part of the delicate adjustments required by our federalism, Congress has rigorously controlled the 'inferior courts' in their relation to the courts of the states. The unitary system of the courts of England is saved these problems.
>
> "The guiding consideration in the enforcement of the congressional policy was expressed by Mr. Justice Campbell, for the Court, in *Taylor v. Carryl*, 20 How. (U.S.) 583, 597:
>
> " 'The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the State and of the Union in any collision.' "

The case of *Bethlehem Steel Corp. v. N. Y. State Labor Relations Board*, 330 U.S. 767, cited in the opinion of the Court below, is not authority for a Three-Judge District Court to assume jurisdiction in this proceeding. The appeal in the *Bethlehem Steel Corp.* case was from the New York Court of Appeals. We are likewise contending that this matter should be permitted to proceed through the Supreme Court of the State of California.

B. The Federal District Court should have refused to issue a declaratory judgment because the declaratory complaints set forth a claim of right under the Federal law which in reality is in the nature of a defense to action proposed by the State Commission.

Appellants are making no claim under Federal law. The claim of jurisdiction to establish rates covering the operations in question is founded upon Section 22 of Article XII of the Constitution of the State of California. The appellees' claim under the Civil Aeronautics Act is in the nature of a defense.

We quote from the majority opinion of *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237, 248, 97 L.ed. (Adv. Ops.) 176, 183:

> "* * * Where the complaint in action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigation from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. * * *."

We submit that the Federal District Court should have exercised its discretionary power to withhold equitable and declaratory relief to avoid needless friction with the State policies.

III.

UPON A CONSIDERATION OF THE MERITS OF THIS CASE, THE FEDERAL DISTRICT COURT SHOULD HAVE DECLARED THAT THE RATES FOR THE TRANSPORTATION IN QUESTION ARE SUBJECT TO THE JURISDICTION OF THE STATE COMMISSION AND SHOULD HAVE DISSOLVED THE TEMPORARY INJUNCTION.

A. Transportation by appellee air carriers only between the mainland of California and Catalina Island is wholly within the State of California and involves intrastate and not interstate commerce. The rates covering such transportation are subject to the jurisdiction of the State Commission.

A proceeding to ascertain the exact boundaries of the State of California is now before this Court. *United States v. California,* October Term, 1953, No. 6, Original.

In this proceeding the State of California claims that the waters between the mainland of California and Catalina Island are inland waters of the State of California. The Report of the Special Master dated October 14, 1952, finds otherwise, but the State of California has filed exceptions to this report.

Appellants herein likewise claim that the route in question is wholly within the boundaries of the State of California. In support of this claim, we refer this Court to the comprehensive brief dated June 6, 1952, submitted by the Attorney General of the State of California in the proceeding before this Court, entitled *United States v. California,* October Term, 1953, No. 6, Original.

We shall briefly state the arguments in support of our claim that the route in question is wholly within the boundaries of the State of California.

Section 1 of Article XXI of the California Constitution of 1849 defines the westward boundary of the State of California as follows:

> "Section 1. The boundary of the State of California shall be as follows: * * * thence running west and along said boundary line, to the Pacific Ocean, and extending therein three English miles; thence, running in a northwesterly direction and following the direction of the Pacific Coast, to the forty-second degree of north latitude; thence, on the line of said forty-second degree of north latitude, to the place of beginning. Also all the islands, harbors, and bays along and adjacent to the coast."

Congress accepted the California Constitution and passed the Act of Admission. (Act of Sept. 9, 1850, 9 Stat. 452.)

Under the decision of this Court in *United States v. California*, 332 U.S. 19, this Court recognized that all waters shoreward of the base line of the three-mile marginal belt are inland waters. Hence, all the area within California constitutional boundaries, with the exception of the three-mile marginal belt, constitute inland waters of the State.

The inclusion of the islands as specified in the California Constitution strongly suggests that the boundary was intended to run around them. The phrases "running in a northwesterly direction" and "following the direction of the Pacific Coast" indicate that the boundary of California runs outside the off-lying islands.

Such a boundary would be consistent with the position taken by the United States in the Alaska Boundary Arbitration that the relevant coast line for boundary purposes is the political coast line which treats all off-lying islands as part of the mainland (4 Alaska Boundary Arbitration 31) and with the decision of the International Court of Justice in *United Kingdom v. Norway*, I.C.J. Reports, 1951, p. 116, previously referred to in our jurisdictional statement.

Sound historical basis supports the establishment of the California boundary so as to include as its inland waters the area shoreward of the off-lying islands. In 1790, when California was still a Spanish possession, England expressly stipulated in Article 4 of the Nootka Treaty with Spain that "British subjects shall not navigate nor carry on their fisheries in the said seas within the distance of 10 maritime leagues from any part of the coast already occupied by Spain." (W. R. Manning, The Nootka Sound Controversy, Am. Hist. Assn. Annual Report 1904, p. 279.) A line 10 maritime leagues from the coast would include the waters between the California mainland and Catalina Island.

In 1879 the last sentence of Section 1 of Article XXI of the California Constitution was revised to read: "Also, including all islands, harbors, and bays along and adjacent to the coast."

We quote from the California Attorney General's brief dated June 6, 1952, in *United States v. California*, No. 6, Original, the discussion concerning certain California cases.

Pages 49 and 50:

"The first case in which the constitutional provision came before the California Supreme Court was *Ex parte Keil,* 85 Cal. 310 (1890). There the Court held that the transportation of two sailors from the California mainland to Catalina Island did not constitute taking them 'out of the state' within the meaning of the California kidnapping statute. (Penal Code Sec. 207.) The Court reached the conclusion as a matter of construction of the Penal Code and it did not decide the 'nice and important question, as to which the Court is not agreed, * * * whether or not any part of the channel between Santa Catalina and the mainland is, as between the state and the nation, or as between the United States and foreign nations, a part of the high seas.' However, the concurring opinion by two judges makes it apparent that the other five members of the Court were of the opinion that the channel waters were a part of this state.[13]"

Note 13 on page 50 reads:

"[13]In *Wilmington Transportation Co. v. Railroad Commission,* 166 Cal. 741 (1913), affirmed 236 U.S. 151 (1915), the California Supreme Court held that transportation of freight and commerce from the California mainland to Catalina is not 'commerce with foreign nations' so as to oust the State Railroad Commission of jurisdiction. The Court assumed that the cross-channel voyage took the vessels on to the high seas and out of the jurisdiction of California. Since, however, the question was not raised or argued, these assumptions cannot be considered authoritative. Moreover, in considering the effect of this case, it is well to bear in mind the following statement by the International Court of Justice in *United*

Kingdom v. Norway: 'The Court considers that too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the United Kingdom Government claims to have discovered in Norwegian practice.' (Judgment p. 138.)"

Pages 51 and 52:

"Probably the most significant of the California Supreme Court cases is the most recent one, *People v. Stralla*, 14 Cal. 2d 617 (1939). The question in the case was whether a gambling ship anchored four miles from shore in Santa Monica Bay was within California's territorial jurisdiction so as to be subject to her criminal statutes. The District Court of Appeal held that there was no such jurisdiction.

"In his petition for hearing in the Supreme Court the Attorney General of California urged as his first point that Santa Monica Bay was a bay within the meaning of that term as used in the California constitutional provision. The Attorney General went on, however, to devote a section of his petition to the proposition that under the Constitution, 'That body of water lying easterly of the islands adjacent to the coast is within the boundaries of the state of California.' In the course of the argument, the Attorney General pointed out that 'by the very words of the Constitution the islands are included within the boundary,' and that 'by including the islands within the boundary, the water lying easterly of the islands is necessarily within the boundary.' This position advanced by California constitutes in itself an assertion of jurisdiction by the state.

"• • • the United States Attorney, who stated (Appendix 3, p. 2) that he was 'acting on the express direction of the Attorney General of the United States

and in the name and in behalf of the United States of America,' filed an *amicus curiae* brief in support of California in which he adopted the brief for California in its entirety. (Appendix 3, p. 12.) On the basis of these briefs, the California Supreme Court determined that Santa Monica constitutes a bay within the meaning of that term as used in the Constitution of 1849. Consequently the Court held that 'the jurisdiction of the state extends over the waters of Santa Monica Bay landward from a line drawn between its headlands, Point Vincente and Point Dume, and *at least* for a distance of three miles oceanward from that line.' (14 Cal. 2d, at 633.) The inclusion of the phrase 'at least' in the holding indicates that while the Court was following the salutary principle of deciding no more than necessary to dispose of the case before it, it wished to preserve California's jurisdiction beyond the area in dispute." (Italics ours.)

In 1949 the California legislature in Section 170 of the Government Code spelled out with more precision the western boundary which was defined in the Constitution one hundred years earlier:

"170. *Declaration of boundary of State.* To give greater precision to the boundary of the State of California as defined in Article XXI of the Constitution, it is hereby declared that the part of the boundary which is described as 'running in a northwesterly direction and following the direction of the Pacific Coast to the forty-second degree of north latitude,' and as 'including all the islands, harbors, and bays along and adjacent to the coast,' runs and has in the past run three English nautical miles oceanward of lines drawn along the outer sides of the outermost

of the islands, reefs and rocks along and adjacent to the mainland and across intervening waters; * * *"

Section 171 of the Government Code defines inland waters as follows:

"171. *Inland waters of State defined.* All waters between the mainland and the outermost of the islands, reefs and rocks along and adjacent to the coast of the State of California from which the boundary of the State is measured, and all waters between the islands, reefs and rocks themselves, are declared to be and to have been in the past inland waters of the State. Similarly, all waters within the lines around harbors and across bays, from which the boundary of the State is measured, are declared to be and to have been in the past inland waters of the State. These waters are 'waters thereof' within the meaning of that phrase in Section 25 of Article I of the Constitution."

We quote further from the brief of the Attorney General of California, pages 57 and 58:

"In establishing its seaward boundary so as to assert jurisdiction over the channels, bays, and harbors along its coast, California was acting well within its authority under the federal system. In *Manchester v. Massachusetts*, 139 U.S. 240 (1891) the United States Supreme Court had before it a situation which closely parallels the assertions of jurisdiction that have been made by California. The Public Statutes of Massachusetts provide that 'when an inlet of the sea does not exceed two marine leagues in width between its headlands,' the boundary of the state is a 'straight line from one headland to the other.' Massachusetts

sought to enforce in Buzzard's Bay its statutes regulating fishing which were confined by their terms to waters 'within the jurisdiction of this Commonwealth.' Manchester challenged the enforcement of the regulatory statutes on the grounds that the waters of the Bay were beyond the jurisdiction of Massachusetts. He argued that jurisdiction over the waters of the Bay rested 'upon rights of sovereignty inseparably connected with national character' and thus was exclusively vested in Congress.

"The Supreme Court explicitly upheld the authority of Massachusetts to define its boundaries so as to bring within its jurisdiction such inland water areas as Buzzard's Bay. The Court said:

> "'* * * Within what are generally recognized as the territorial limits of States, by the law of nations, a State can define its boundaries on the sea and the boundaries of its counties; and by this test the Commonwealth of Massachusetts can include Buzzard's Bay within the limits of its counties.'

As this quotation indicates the only restriction placed by the Court on the State's power to assert jurisdiction over inland waters was that the assertion must not exceed the limits of international law. The Court went on to hold that in the absence of any conflicting federal regulation, Massachusetts could exercise its jurisdiction over the Bay by enforcing its statutes regulating fishing."

We also quote from pages 118-121 of the brief of the Attorney General of California:

"1. Many nations have found it advantageous to adopt the exterior coastline extending around off-

lying islands as the baseline for their marginal sea. These nations include Australia, Canada, Denmark, Ecuador, Fiji, Finland, France, Hawaii, Iceland, Iran, Norway, Russia, Saudi-Arabia, Sweden;

"2. The system of the exterior or political coast line contravenes no principle of international law;

"3. The use of the exterior coast line as a base line for the marginal sea does not depend on any arbitrary or limited distance that such a line may extend across a water area. The line in each case is a political line based upon laws or decrees of a sovereign state and not upon any arbitrary limitation of distance;

"4. That the United States is free, if it finds that it is in the national interest to do so, to recognize and declare that the waters between the off-lying islands of California and the mainland are wholly inland waters.

"*National Security.* The Supreme Court recognized the close relationship between the marginal belt and our national security by pointing out that it was a 'protective belt' which will be of 'crucial importance should it ever again become impossible to preserve that peace.' (332 U. S. at 35.) As this statement by the Supreme Court indicates, the military advantage or disadvantage of any of the suggested locations of the marginal belt is a matter of the highest importance to our national security.

"The strategic importance of the California coastal areas is amply demonstrated by mentioning a few of the many military installations which dot the shoreline and the offlying islands of the area in issue here. San Clemente Island has been completely taken over

by the Navy and civilians are not permitted to enter. [Tr. p. 613.] Defense installations have been made on San Miguel and San Nicolas Islands in the Santa Barbara Channel. [Tr. p. 330.] A substantial part of the facilities on Catalina Island were taken over for defense purposes during World War II.

"These islands guard a chain of Army, Navy and Air Corps bases on the shore of the mainland. Shoreward from the Santa Barbara Channel lies Point Mugu, an important guided missile installation, and Point Huenème, which has tremendously expanded as a Navy base in recent years. (Tr. p. 248.) San Pedro Bay is a western base for the Pacific Fleet of the Navy, as well as being adjacent to the Navy Air Station at Reeves Field and the Army's Fort MacArthur. San Clemente Island protects the approach to the major Navy base at San Diego, the Navy Air Station at North Island and the Marine Base at Camp Pendleton.

"The presence of these vital military installations in the coastal areas in issue here make it especially relevant to reiterate that the distribution of rights in the offshore area among various nations will be determined by fixing the outer limits of inland water. As we move seaward through the water areas which our nation may designate as its inland waters and marginal belt to the high sea, the rights and powers of the United States diminish, while conversely, the rights of foreign nations increase. This is strikingly illustrated by the rights of foreign warships and airplanes in the respective zones in the offshore area.

"Foreign warships and aircraft are at all times wholly unrestricted in their movement on the high seas. The rights of foreign warships in the marginal

belt are at present in doubt, as shown by the fact that the International Court of Justice declined to rule on this point in the Corfu Channel case.[29] But in its inland waters, the adjacent nation has exclusive and complete control.

"The agency which determines the outer limits of inland waters will thus be doing much more than fixing a theoretical line. It will be determining how near foreign warships and aircraft may lawfully approach our shores and harbor installations. It also will be fixing the location of our neutrality zone, for that has been one of the historic functions of the marginal belt. The sum of the matter is that the fixing of the baseline will determine whether foreign nations are to have rights in the waters surrounding our island military installations and between these installations and our coastal bases or whether those waters are to be set aside for the exclusive jurisdiction of the United States.

"It would appear that there are military dangers to placing the belt immediately adjacent to our shores, and on the other hand, military advantages to placing it as far seaward as possible. It is the belief of California that the protection of our harbors, the security of our military bases on the shore and on the offshore islands, and the integrity of our inland shipping lanes demand the placement of the marginal belt as far seaward as can be done within the limits of international practice. There would appear to be a substantial risk of subverting the best interests of our nation by the adoption of a proposal for the location of the marginal belt, such as that offered by Plaintiff, which completely ignores the significance of the areas to our National security."

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[29] I. C. J. Reports, 1949, p. 4.

Subsequent to the filing of the Master's Report with this Court in *United States v. California*, No. 6, Original, the Congress of the United States has enacted the Submerged Lands Act, Chapter 65, Public Laws 31, 83rd Congress, reprinted in U. S. Code and Administrative News, 1953, No. 9, pages 1175-1180.

We quote from the provisions of this act.

"Sec. 2. When used in this Act——

"(a) The term 'lands beneath navigable waters' means——

* * * * * * *

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, * * *

* * * * * * *

"Sec. 4. Seaward Boundaries.

—The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or

hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond the three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

These sections show that Congress gives recognition to the fact that a State's seaward boundaries may extend more than three miles from its coast. We have demonstrated that the boundaries of California extend beyond Catalina Island.

United is an interstate as well as an intrastate air carrier and hence must file rates covering its California operations both with the Civil Aeronautics Board and with the appellant Commission. For example, tariffs of United's air coach fares for passenger transportation between San Francisco and Los Angeles are on file with both Commissions. In support of their position that the Civil Aeronautics Board has exclusive jurisdiction over the rates in question, appellee air carriers state that they have had tariffs of rates covering the operations in question on file with the Civil Aeronautics Board for thirteen years and that they have never filed tariffs of such rates with appellant Commission. Even though this Court finds that appellee air carriers must file rates covering its Catalina operations with appellant Commission, appellee

air carriers undoubtedly will continue to file such rates with the Civil Aeronautics Board in so far as they involve interstate commerce. The fact that the appellant Commission may not have asserted jurisdiction over the rates in question for a period of years does not destroy its authority to do so. *Kelly v. Washington,* 302 U.S. 1 (1937).

The case of *Northwest Airlines v. Minnesota,* 322 U.S. 292 (1944), to which reference is made by appellee air carriers refers to "regulating air commerce" and not to "regulating air transportation". Under the Civil Aeronautics Act the Civil Aeronautics Board regulates only the rates charged by air carriers in "air transportation".

We submit that the route of appellee air carriers in question is an intrastate route, and the intrastate rates in question may be established by appellant Commission. *United Air Lines, Inc. et al.,* 50 Cal. P.U.C. 563 (1951); review denied, *United Air Lines v. Commission,* 37 A. C. 633, 1 (1951); appeal dismissed, *United Air Lines v. Commission,* 342 U.S. 908 (1952).

B. Through the enactment of the Civil Aeronautics Act Congress has not preempted the regulation of the rates of appellee air carriers for transportation over the routes in question wholly between the mainland of California and Catalina Island.

The ~~rates,~~ fares and charges for transportation by air carriers between the mainland of California and Catalina Island where the transportation over such route has not previously or subsequently passed over the territory of any other state or country is a matter primarily of local concern to the people of the State of California. In the absence of preemption of the field of regulation by the

Federal authority such rates, fares, and charges are subject to the regulatory jurisdiction of the appellant Commission. *Wilmington Transportation Co. v. Railroad Commission*, 236 U.S. 151, 156, 59 L.ed. 508, 517; *United Air Lines, Inc., et al.*, 50 Cal. P.U.C. 563; review denied, *United Air Lines v. Commission*, 37 A.C. 633, 1; appeal dismissed, *United Air Lines v. Commission*, 342 U.S. 908.

We also refer this Court to the case of *U. S. v. Yellow Cab Company*, 332 U.S. 218, 230-234, 91 L.ed. 2010, 2020-2022, wherein this Court held that the Sherman Anti-Trust Act does not apply to that type of interstate commerce which exists where a railroad passenger rides in a taxicab from his home to a railroad station in Chicago in connection with an interstate journey and where a railroad passenger completing an interstate journey rides from a railroad station in Chicago to his home. The holding in this case was reaffirmed by this Court in the case of *U. S. v. Yellow Cab Company*, 338 U.S. 338, 339, 94 L.ed. 150, 152.

The Sherman Anti-Trust Act has fully occupied the field of interstate and foreign commerce but, nevertheless, this Court held that the particular taxicab transportation in question, although it admittedly is interstate commerce, is not the type of interstate commerce that the Congress intended the statute to cover. This Court pointed out that the taxicab operations in question are so predominantly of a local nature that it must be assumed that the Congress never intended that it be subject to the Sherman Anti-Trust Act.

The air carrier operations between the mainland of California and Catalina are so predominantly of a local nature as to exclude them from the intent of Congress

to cover them in its definition of interstate air transportation under the Civil Aeronautics Act. *The particular transportation involved,* even though it be admitted for the sake of argument that it is something other than intrastate commerce, *is not the type of commerce which the Civil Aeronautics Act covers.*

The contrary interpretation placed upon the Civil Aeronautics Act by the lower Federal Court and appellees leads to results sufficiently absurd to condemn any such interpretation. For example a United plane carrying passengers between San Francisco and Los Angeles by flying out to sea beyond the 3-mile limit and then returning to the California shore could avoid having its rates for intrastate passengers regulated by the State Commission.

One of the strongest presumptions known to the law is that Federal authority has not superseded State authority because the superseding of State authority by the Federal government strikes at that delicate balance between Federal and State jurisdictions upon which our Federal form of government is based. The superseding of State authority will be declared only where there is no possible doubt as to the clear intent of the Congress so to supersede State authority. Furthermore, it must clearly appear that the Federal invasion of State authority is necessary. Nothing must be left to inference or presumption.

Palmer v. Massachusetts, 308 U.S. 79, 82-85, 84 L.ed. 93, 96-99;

Yonkers v. United States, 320 U.S. 685, 690-691, 88 L.ed. 400, 403-405;

North Carolina v. United States, 325 U.S. 507, 511, 89 L.ed. 1760, 1765;

Arkansas R. R. Commission v. Chicago, Rock Island & Pac. R. R. Co., 274 U.S. 597, 603, 71 L.ed. 1224, 1228.

This Court has consistently held that it will not construe an act of the Congress as superseding State authority and jurisdiction unless the statute be clear and unequivocal on the point. Mr. Justice Jackson, speaking for this Court clearly reiterated these principles in the case of *Davies Warehouse Co. v. Bowles* (1944), 321 U.S. 144, 153-155, 88 L.ed. 635, 642-643:

> "Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent.
>
> • • • • • • •
>
> "At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. • • •
>
> "At least in the absence of congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden but one implied by the terms of the legislation

when viewed against the background of our form of government."

In section 1(21)(a) of the Civil Aeronautics Act of 1938 (49 U.S.C.A. 401(21)(a)) Congress defined "interstate air transportation" so as to include "the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce between * * * *places in the same State of the United States through air space over any place outside thereof.*" (Emphasis added.)

The term "State" as used in Section 1(21)(a) of the Civil Aeronautics Act (49 U.S.C.A. 401(21)(a)) need not be limited to the territorial boundaries of a state but may reasonably include its jurisdictional boundaries. Certainly the waters between the mainland of California and Santa Catalina are within the jurisdictional boundaries of the State of California. Such being the case, the route in question is not outside of the State of California and hence does not fall within the definition of "interstate air transportation" in the Civil Aeronautics Act.

Appellee air carriers in their statement in opposition to appellants' jurisdictional statement have referred to the legislative history of pertinent sections of the Civil Aeronautics Act. They quote from a letter dated July 31, 1935, from Joseph B. Eastman, Federal Coordinator of Transportation, to Senator Burton K. Wheeler, appearing in Volume 1 at page 68 of "U. S. Senate, Committee on Interstate Commerce, Hearings, 74th Congress," but omit one vital sentence. We add that sentence:

"Section 403(k), page 4: * * * It is suggested * * * that after the word 'through' in line 18 there be sub-

stituted for the words 'another State' the words 'the air space over any place outside thereof'. The latter change would include as interstate commerce transportation between points in the same State over a foreign country or the high seas as well as over another State. *There is the same need for regulation in the one case as in the other.*" (Emphasis added.)

What is the need for regulation when the flight is between points in California but over the State of Nevada? Neither California nor Nevada can effectively regulate the fares for such a flight. *Hanley v. Kansas City Southern Railway*, 187 U.S. 617, 620. Unless Congress provides for regulation there is no effective regulation.

In order for the same need to exist where the flight is over the high seas the flight must extend beyond the point where the flight is a matter of local concern only to the State of California. In other words it must extend not only beyond the geographical boundaries but the jurisdictional boundaries as well.

Suppose Mr. Eastman in his letter instead had said, "We prefer the broader definition since it will enable the Civil Aeronautics Authority to regulate certain rates which are now subject to regulation by the States because they are matters of local concern; for example, the rates for air transportation wholly between the mainland of California and Catalina Island." We submit that both the meaning of the definition and the reception of the proposal by the Congress would have been strikingly different.

Numerous bills have been presented to the Congress *which have sought to extend Federal economic regulation to intrastate operations of air carriers.*

In this connection we refer this Court to the legislative history of the following bills, none of which has been enacted:

78th Congress: Lea-Bailey Aviation Bill introduced as H.R. 1012 and S. 246; revised form of Lea-Bailey Aviation Bill, H.R. 3420; Boren Bill, H.R. 4845; Reece Bill, H.R. 4848.

79th Congress: Lea Bill, H.R. 674; Johnson Bill, S. 541; Lea Bill, H.R. 3383.

80th Congress: Wolverton Bill, H.R. 2337.

81st Congress: Brewster Bill, S. 423; Johnson Bill, S. 445; Johnson Bill, S. 2435.

A concise discussion of these bills and the opposition they met in the Congressional Committees will be found in the following reports of the proceedings of the National Association of Railroad and Utilities Commissioners:

1944 N.A.R.U.C. Proceedings 221
1945 N.A.R.U.C. Proceedings 299
1946 N.A.R.U.C. Proceedings 210
1947 N.A.R.U.C. Proceedings 128
1948 N.A.R.U.C. Proceedings 69
1949 N.A.R.U.C. Proceedings 166
1950 N.A.R.U.C. Proceedings 106

For a strong statement in support of the desirability of exclusive Federal regulation of all air navigation and air commerce we refer to the paragraphs appearing under the heading "Federal Jurisdiction" commencing

on page 8 of H.R. Report No. 784, on the Civil Aviation Bill, 78th Congress—H.R. 3420, submitted by Mr. Bulwinkle, from the House of Representatives Committee on Interstate and Foreign Commerce. This statement commences and reads as follows:

> "The inherent nature of aviation requires Federal regulation of all air navigation and air commerce. Such regulation is provided for in the bill".

We also quote from the Minority Views of same report at page 41:

> "The signers of these minority views do not agree with H.R. 3420, as reported by the Committee, because (1) it destroys States' rights, • • •
>
> "(b) The committee bill (by specific provisions hereinafter set forth) *takes away* (emphasis added) all rights of the States:
>
> "(1) *To regulate intrastate commerce by air,* including certificates, permits, rates, and all other matters normally subject to the State regulation of intrastate operations of public utilities."

As previously stated the minority views prevailed and the Congress did not *take away* the rights of the States. H.R. 3420 was never enacted into law.

We submit that through the enactment of the Civil Aeronautics Act the Congress intended to provide for the regulation of those rates of air carriers which could not be effectively regulated by the states. It did not intend to supersede effective state regulation.

As we have previously stated appellants contend that this Court should dispose of this case on the procedural

grounds which it has held to be of jurisdictional substance. However, if the merits are reached, we submit that the decision must nevertheless be in favor of appellants.

CONCLUSION.

For the procedural reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the Court below should be directed to dissolve the injunctions and to dismiss the complaints. If a judgment is rendered on the merits, the Court below should be directed to dissolve the injunctions and declare that the State Commission has jurisdiction to establish rates for transportation over the routes in question wholly between the mainland of California and Catalina Island.

Dated, San Francisco, California,
October 16, 1953.

EVERETT C. MCKEAGE,
Chief Counsel,
J. THOMASON PHELPS,
Senior Counsel,
WILSON E. CLINE,
Counsel for Appellants.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

Section 20 of Article XII of the California Constitution:

"No railroad or other transportation company shall raise any rate or charge for the transportation of freight or passengers or any charge connected therewith or incidental thereto, under any circumstances, whatsoever, except upon a showing before the railroad commission provided for in this Constitution, that such increase is justified, and the decision of the said commission upon the showing so made shall not be subject to review by any court except upon the question whether such decision of the commission will result in confiscation of property."

The first sentence of the second paragraph of Section 22 of Article XII of the California Constitution:

"Sec. 22. • • •

"Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. • • •"

Portions of Section 1 of Article XXI of the California Constitution of 1849:

"Section 1. The boundary of the State of California shall be as follows: . . . thence running west and along said boundary line, to the Pacific Ocean, and extending therein three English miles; thence, running in a northwesterly direction and following the direction of the Pacific Coast, to the forty-second degree of north latitude; thence, on the line of said forty-second degree of north latitude, to the place of beginning. Also all the islands, harbors, and bays along and adjacent to the coast."

In 1879 the last sentence of Section 1 of Article XXI of the California Constitution was revised to read: "Also, including all islands, harbors, and bays along and adjacent to the coast."

Sections 170 and 171 of the California Government Code:

"170. *Declaration of boundary of State.* To give greater precision to the boundary of the State of California as defined in Article XXI of the Constitution, it is hereby declared that the part of the boundary which is described as 'running in a northwesterly direction and following the direction of the Pacific Coast to the forty-second degree of north latitude,' and as 'including all the islands, harbors, and bays along and adjacent to the coast,' runs and has in the past run three English nautical miles oceanward of lines drawn along the outer sides of the outermost of the islands, reefs and rocks along and adjacent to the mainland and across intervening waters; . . ."

"171. *Inland waters of State defined.* All waters between the mainland and the outermost of the islands,

reefs, and rocks along and adjacent to the coast of the State of California from which the boundary of the State is measured, and all waters between the islands, reefs and rocks themselves, are declared to be and to have been in the past inland waters of the State. Similarly, all waters within the lines around harbors and across bays, from which the boundary of the State is measured are declared to be and to have been in the past inland waters of the State. These waters are 'waters thereof' within the meaning of that phrase in Section 25 of Article I of the Constitution."

Sections 1701 through 1706, 1731, 1756 through 1767 and 2107 of the California Public Utilities Code:

"1701. All hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission.

"1702. Complaint may be made by the commission on its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision

of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water or telephone corporation, unless it is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service.

"1703. All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties. In any review by the courts of orders or decisions of the commission the same rule shall apply with regard to the joinder of causes and parties as herein provided. The commission shall not be required to dismiss any complaint because of the absence of direct damage to the complainant.

"1704. Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the corporation or person complained of. Service in all hearings, investigations, and proceedings pending before the commission may be made upon any person upon whom a summons may be served in accordance with the provisions of the Code of Civil Procedure, and may be made personally or by mailing in a sealed envelope, registered, with postage prepaid. The commission shall fix the time when and place where a hearing will be had upon the complaint and shall serve notice thereof, not less than 10 days before the

time set for such hearing, unless the commission finds that public necessity requires that such hearing be held at an earlier date.

"1705. At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof, except as otherwise provided, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order.

"1706. A complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review an order or decision of the commission, a transcript of such testimony,

together with all exhibits or copies thereof introduced, and of the pleadings, record, and proceedings in the cause, shall constitute the record of the commission, but if the petitioner and the commission stipulate that certain questions alone and a specified portion only of the evidence shall be certified to the Supreme Court for its judgment, such stipulation and the questions and the evidence therein specified shall constitute the record on review."

"1731. After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has made, before the effective date of the order or decision, application to the commission for a rehearing."

"1756. Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable not later than 30 days after the date of issuance, and shall direct the commission to certify

its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason shown it is continued.

"1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

"1758. The commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article.

"1759. No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the per-

formance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

"1760. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

"1761. The pendency of a writ of review shall not of itself stay or suspend the operation of the order or decision of the commission, but during the pendency of the writ the Supreme Court in the manner provided in this article in its discretion may stay or suspend in whole or in part the operation of the commission's order or decision.

"1762. Except as provided in this section, no order staying or suspending an order or decision of the commission shall be made by the Supreme Court except upon five days' notice and after hearing. If the order or decision of the commission is stayed or suspended the order suspending it shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage, but the Supreme Court may grant a temporary stay restraining the operation of the commission order or decision at any time before such hearing and determination of the application for a stay when, in its opinion irreparable loss or damage would result to petitioner unless such temporary stay is granted.

Such temporary stay shall remain in force only until the hearing and determination of the application for a stay upon notice. The hearing of such application for a stay shall be given precedence and assigned for hearing at the earliest practicable day after the expiration of the notice.

"1763. No temporary stay shall be granted by the Supreme Court unless it clearly appears from specific facts shown by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and hearing had on a motion for a stay as provided in this article. Every such temporary stay shall be endorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it appears to be irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry not to exceed 10 days as the court may fix unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary stay is granted without notice the matter of the issuance of a stay shall be set down for hearing at the earliest possible time, and when it comes up for hearing the party obtaining the temporary stay shall proceed with the application for a stay and if he does not do so the court shall dissolve the temporary stay.

"1764. In case the order or decision of the commission is stayed or a temporay stay granted, the order of the court shall not become effective until a suspending bond is executed and filed with and approved by the court, payable to the people of the State of

California and sufficient in amount and security to insure the prompt payment by the party petitioning for the review, of all damages caused by the delay in the enforcement of the order or decision of the commission and of all money which any person or corporation may be compelled to pay pending the review of the proceedings, for transportation, transmission, product, commodity, or service in excess of the charges fixed by the order or decision of the commission, in case such order or decision is sustained. The court, in case it stays or suspends the order or decision of the commission in any matter affecting rates or classifications, may also in its discretion direct the public utility affected to pay into court from time to time, there to be impounded until the final decision of the case, or into some bank or trust company paying interest on deposits, under such conditions as the court prescribes, all sums of money which it collects from any corporation or person in excess of the sum such corporation or person would have been compelled to pay if the order or decision of the commission had not been stayed or suspended.

"1765. In case the Supreme Court stays any order or decision denying to the utility an increase in any rate or classification, the court may condition such stay or temporary stay so as to permit petitioner to charge a higher rate pending the determination of the review and may attach other reasonable conditions to such stay or temporary stay.

"1766. In case the Supreme Court stays or suspends any order or decision lowering any rate or classification or stays any order or decision denying petitioner the right to charge an increased rate or classification and as a condition thereof permits the charging of

higher rates, the court shall require the public utility affected to keep such accounts, verified by oath as may, in the judgment of the court, suffice to show the amounts being charged or received by such public utility, pending the review, in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the order or decision of the commission is upheld. The court may from time to time require the petitioner to give additional security, or to increase the suspending bond, whenever, in its opinion such action is necessary to insure the prompt payment of the damages and overcharges. If the final decision by the Supreme Court upholds the commission's order or decision, all money which the public utility has collected pending the appeal in excess of that authorized by the order or decision of the commission, together with such interest as may be reasonable, shall be promptly paid to the corporations or persons entitled thereto in the manner prescribed by the court.

"1767. All actions and proceedings under this part and all actions or proceedings to which the commission or the people of the State of California are parties in which any question arises under this part, or under or concerning any order or decision of the commission, shall be preferred over, and shall be heard and determined in preference to, all other civil business except election causes, irrespective of position on the calendar. The same preference shall be granted upon application of the attorney of the commission in any action or proceeding in which he is allowed to intervene."

"2107. Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense."

Sections 1331, 1337, 1342, 2201 and 2281 of Title 28, United States Code:

"1331. The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States."

"1337. The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

"1342. The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:

"(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,

"(2) The order does not interfere with interstate commerce; and,

"(3) The order has been made after reasonable notice and hearing; and,

"(4) A plain, speedy and efficient remedy may be had in the courts of such State."

"2201. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

"2281. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Sections 1(2), 1(10), 1(21), 403, 404(a), and 404(b) of the Civil Aeronautics Act of 1938. (49 U.S.C.A. 401(2), 401(10), 401(21), 483, 484(a) and 484(b)):

"401(2). 'Air carrier' means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not

directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest."

"401(10). 'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

"401(21). 'Interstate air transportation', 'overseas air transportation', and 'foreign air transportation', respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

"(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

"(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

"(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

"483(a). Every air carrier and every foreign air carrier shall file with the Board, and print, and keep

open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

"(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the

Board to be specified in such tariffs, except those specified therein. Nothing in this chapter shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees and their immediate families; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the Board may by regulation prescribe.

"(c) No change shall be made in any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier, except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The Board may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

"(d) Every air carrier or foreign air carrier shall keep currently on file with the Board, if the Board

so requires, the established divisions of all joint rates, fares, and charges for air transportation in which such air carrier or foreign air carrier participates."

"484(a). It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

"(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 2(a)(2) and Section 4 of the Submerged Lands Act, Chapter 65, Public Law 31, 83rd Congress:

"Sec. 2. When used in this Act——

"(a) The term 'lands beneath navigable waters' means——

• • • • • • •

"(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles,

• • •

• • • • • • •

"Sec. 4. Seaward Boundaries.

——The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond the three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.'"

Appendix B

Commissioners
Richard E. Mittelstaedt, President
Justus F. Craemer
Harold P. Huls
Kenneth Potter
Peter E. Mitchell

Public Utilities Commission
State of California
August 6, 1951

File No. 360-1

Address All Communications to the Commission

California State Building
San Francisco 2, Calif.

Mr. W. Delaney Dilworth
Traffic Manager
United Air Lines, Inc.
5959 South Cicero Avenue
Chicago 38, Illinois

Dear Mr. Dilworth:

We understand that the United Air Lines, Inc., is providing passenger transportation service by air for the public generally between Long Beach and Avalon, Santa Catalina Island.

A review of our official file fails to indicate that the United Air Lines have a tariff on file with this Commission which sets forth the fares, rules and charges applicable to the aforementioned California intrastate traffic.

It is requested that you inform this office as to what action United Air Lines contemplates taking in this matter.

Yours very truly,

(Sgd) Warren K. Brown

Director of Transportation

Letterhead of
United Air Lines

September 10, 1951

Mr. Warren K. Brown
Director of Transportation
Public Utilities Commission of
the State of California
California State Building
San Francisco 2, California

Re: Your File No. 360-1

Dear Mr. Brown:

Thank you for your kind consideration in sending to me a copy of your letter of August 6, 1951.

With particular reference to that letter, United Air Lines Inc. is providing air transportation for the carriage of persons and property between Los Angeles and Avalon and also between Long Beach and Avalon, in both directions.

We have on file with the Civil Aeronautics Board our tariffs covering the fares, rates and charges applicable to this service. Inasmuch as the Public Utilities Commission of the State of California does not have juris

diction over the regulation of this service, we have not filed a tariff with your Commission.

Very truly yours,

W. Delaney Dilworth
Traffic Manager

pss:ab
cc: John T. Lorch, Esq.
Oscar A. Trippetf, Esq.
Charles Stearns, Esq.
Paul Hebard—EXORD

Commissioners
Richard E. Mittelstaedt, President
Justus F. Craemer
Harold P. Huls
Kenneth Potter
Peter E. Mitchell

Public Utilities Commission
State of California

September 20, 1951

File No. 360-1

Address All Communications to the Commission

California State Building
San Francisco 2, Calif.

Mr. W. Delaney Dilworth
Traffic Manager
United Air Lines, Inc.
5959 South Cicero Avenue
Chicago, Illinois

Dear Mr. Dilworth:

It has been brought to the attention of this Commission that United Air Lines is performing air transporta-

tion between Los Angeles, California, and Avalon, on Santa Catalina Island, and also between Long Beach, California, and Avalon, without having filed with this Commission its tariffs covering such transportation. It is our understanding that this operation is intrastate.

In your letter of September 10, 1951, to Mr. Brown, Director of Transportation of this Commission, you take the position that the Public Utilities Commission of California does not have jurisdiction over the service in question.

This is to inform you that this Commission does have jurisdiction over the service in question, it being intrastate, and the Supreme Court of this State has held that such service is subject to the jurisdiction of this Commission. Therefore, you are instructed to file with this Commission the tariffs covering the service in question.

Very truly yours,

(sgd) R. J. Pajalich

R. J. Pajalich, Secretary.

Letterhead of
United Air Lines

October 11, 1951

Mr. R. J. Pajalich, Secretary
Public Utilities Commission of
the State of California
California State Building
San Francisco 2, California

Subject: Letter of September 20, 1951
File No. 360-1

Dear Mr. Pajalich:

The matter of filing a tariff for our Catalina service with the Public Utilities Commission for the State of California was referred to our Law Department for their review. We have just been advised that their opinion will be available this week, and we plan to communicate with you as quickly as it is received.

Very truly yours,

W. Delaney Dilworth
Traffic Manager.

LGB:hk

Commissioners
Richard E. Mittelstaedt, President
Justus F. Craemer
Harold P. Huls
Kenneth Potter
Peter E. Mitchell

Public Utilities Commission
State of California
November 6, 1951

File No. 360-1

Address All Communications to the Commission

California State Building
San Francisco 2, Calif.

Mr. W. Delaney Dilworth
Traffic Manager
United Air Lines, Inc.
5959 South Cicero Avenue
Chicago 38, Illinois

Dear Mr. Dilworth:

This refers to our exchange of letters regarding the filing of a tariff covering your service to Santa Catalina Island. Under date of October 11 you wrote us to the effect that the opinion of your law department in this matter would be available that week and you would communicate with us when it was received.

Can you now inform us what position you propose taking in this matter?

Yours very truly,

(Sgd) Warren K. Brown
Director of Transportation.

November 30, 1951

Mr. Warren K. Brown
Director of Transportation
Public Utilities Commission
State of California
California State Building
San Francisco 2, California

Re: File No. 360-1

Dear Mr. Brown:

This will acknowledge receipt of your letter of November 6, 1951, regarding our service to Santa Catalina Island.

This matter is now in the hands of our local counsel in Los Angeles and you will hear from them within the next few days.

Yours very truly,

W. D. Dilworth
Traffic Manager.

THD:ru

Trippet, Newcomer, Yoakum & Thomas
Lawyers
458 South Spring Street
Los Angeles 13
5 December 1951

Air Mail
Wilson E. Cline, Esq.
Assistant Counsel
Public Utilities Commission
State of California
California State Building
San Francisco 2, California

Re: File No. 360-1
(United Air Lines, Inc.)

Dear Mr. Cline:

You probably are aware of the fact that rather extended correspondence has been exchanged between the Public Utilities Commission and United with respect to that carrier's operation between Santa Catalina Island and the Los Angeles area. Such correspondence has been handled by Messrs. Brown and Pajalich on behalf of the Commission, and personnel in United's general office in Chicago. The question involved is whether or not United is required to file with your Commission tariffs covering the Catalina operation.

The matter has now been referred to us by our client for further handling, and since it concerns a question of law, it seemed appropriate to me that I should address this communication to you.

It is our position, of course, that United is not subject to the jurisdiction of your Commission with respect to

transportation furnished by it between Catalina and the mainland, for all of the reasons which we have heretofore advanced in connection with the Los Angeles-San Francisco air coach fare matter now on appeal to the Supreme Court of the United States. There is present in the Catalina situation an additional factor which, in our opinion, serves to remove any possible doubt with respect to the question. This is the fact that, while the termini of the route; i.e., Avalon and Long Beach-Los Angeles, are within the State of California, all but a small portion of the route traverses the high seas, an area which lies without the boundaries of the State of California (California Constitution Article XXI). Under such circumstance, the express language of the Civil Aeronautics Act establishes the fact of exclusive federal occupancy of the field of regulation (49 U.S.C. 401 (10), (20) and (21)). Ipso facto, this precludes the exercise of control by the state.

I trust that you will agree with the position taken by us, so that the problem may thereby be disposed of. In any event, I shall be pleased to hear from you on the matter.

Yours very truly,

Sgd. Charles Stearns,

of Trippet, Newcomer, Yoakum & Thomas.

CS/rg

(Seal)

PUBLIC UTILITIES COMMISSION
State of California

December 27, 1951

File No. 360-1

Address all Communications to the Commission

California State Building
San Francisco 2, Calif.

Mr. Charles Stearns, Esq.
Trippet, Newcomer, Yoakum & Thomas
458 South Spring Street
Los Angeles, California

Re: File No. 360-1
(United Air Lines, Inc.)

Dear Mr. Stearns:

Your letter of December 5 to Mr. Cline has been referred to this office for reply.

You, of course, are fully aware of the position which has been taken by the Commission with respect to intrastate fares of air carriers operating within the State of California, which position is now supported by decisions of the California Supreme Court.

You now contend that the route between Avalon and Long Beach-Los Angeles traverses the high seas and that state regulation is precluded by reason of the claimed exclusive Federal occupancy of this field of regulation. We have given the sections of the Civil Aeronautics Act to which you have referred us careful consideration. 49 U.S.C. 401(20) is not applicable as it relates to "air commerce". We interpret 49 U.S.C. 401(21) to define "inter-

state air transportation", "overseas air transportation", and "foreign air transportation" separately and not jointly.

Interstate air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in any state of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or *between places in the same State of the United States through the air space over any place outside thereof;* or between places in the same Territory or possession of the United States, or the District of Columbia.

Overseas air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States.

Foreign air transportation is the carriage by aircraft of persons or property as a common carrier or the carriage of mail by aircraft in commerce between a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

The transportation of persons or property by air carrier between Avalon and Long Beach-Los Angeles is not inter-

state or foreign commerce in the general sense or in the Constitutional sense. See *Wilmington Transportation Company v. Railroad Commission,* (1913), 166 Cal. 741, affirmed (1915), 263 [236] U.S. 151, 56 [59] L. ed. 508. Conceding for the sake of argument that such transportation is overseas transportation in the general sense, Congress has not seen fit to include such transportation within its own definition of "overseas air transportation." The language "or between places in the same State of the United States through the air space over any place outside thereof" as used in the definition of "interstate air transportation" undoubtedly applies to transportation between places in the same state where the aircraft has gone through the air space over some other state. Hence the Congress has not occupied the field in so far as the local transportation by aircraft between Avalon and Long Beach-Los Angeles is concerned, and such transportation remains subject to regulation pursuant to the applicable provisions of the California Constitution.

In view of our interpretation of the Civil Aeronautics Act and the California Constitution we again instruct your client United Air Lines, Inc., to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles.

Very truly yours,

/s/ R. J. Pajalich,
Secretary.

Service of the within and receipt of a copy thereof is hereby admitted this _____ day of October, 1953.

_____

Attorney for United Airlines, Inc., and Catalina Air Transport.

_____

Attorney for Civil Aeronautics Board.

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MAR 12 1953
HAROLD B. WILLEY, Clerk

N THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, AND PETER E. MITCHELL, MEMBERS OF AND COLLECTIVELY CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, AND J. THOMASON PHELPS, LEGAL ADVISERS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellants,

vs.

UNITED AIR LINES, INC., A CORPORATION; CATALINA AIR TRANSPORT, A CORPORATION; AND THE CIVIL AERONAUTICS BOARD,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF OF APPELLANTS

EVERETT C. McKEAGE,
Chief Counsel,
J. THOMASON PHELPS,
Senior Counsel,
WILSON E. CLINE,
Counsel for Appellants,
514 State Building,
San Francisco 2, California.

INDEX

	Page
Additional Argument	1
I. The lower Court had no jurisdiction to decide this case upon its merits because appellees are subject to no irreparable injury which entitles them to equitable relief and there is no case or controversy which entitles them to declaratory relief	1
II. Until the administrative processes of the State Commission are exhausted the State and Federal Courts have no jurisdiction	9
III. As an adequate remedy exists in the courts of the State of California for the purpose of reviewing any order issued by the State Commission pertaining to the subject matter of this action, the Federal District Court should have refused to exercise jurisdiction in this case	12
IV. The route in question is wholly within the boundaries of the State of California, and the rates in question are intrastate rates which may be established by the State Commission	16
V. Neither through the enactment of the Civil Aeronautics Act nor through the enactment of the Outer Continental Shelf Lands Act has the Congress preempted the authority of the State Commission to establish rates for the transportation in question	20
Conclusion	25

CITATIONS

Cases:

Abelleira v. *District Court of Appeal*, 17 Cal. 2d 280	12
Alexander v. *State Personnel Board*, 22 Cal. 2d 198	12
Arkansas Power and Light Co. v. *Federal Power Commission*, 60 F. Supp. 907	10

Page

Arkansas Power and Light Co. v. *Federal Power Commission*, 156 F. 2d 821 10
Federal Power Commission v. *Arkansas Power and Light Co.*, 330 U.S. 802 10
Ocean Industries, Inc., v. *Superior Court*, 200 Cal. 235 17
Public Service Commission of Utah v. *Wycoff Co., Inc.*, 344 U. S. 237 5
United Air Lines, Inc., et al., 50 Cal. P. U. C. 563 21
United Air Lines v. *Commission*, 37 A. C. 633 21
United Air Lines v. *Commission*, 342 U. S. 908 ..... 15, 21
United States v. *California*, 332 U. S. 19 19
United States v. *Superior Court*, 19 Cal. 2d 189 12
Wilmington Transportation Co. v. *Railroad Commission*, 236 U. S. 151 21
Wycoff Co. v. *Public Service Commission*, 227 P. 2d 323 6

Statutes:

Act of September 9, 1850, 9 Stat. 452 16

California Constitution of 1849:

Art. XII, Sec. 1 ..... 16, 17

California Constitution:

Art. XII, Sec. 22 ..... 2, 20
Art. XXI, Sec. 1 17

California Government Code:

Sec. 170 ..... 14, 15
Sec. 171 ..... 14, 15

California Public Utilities Code:

Secs. 1731-1732 12
Secs. 1756-1767 13
Sec. 2107 ..... 2, 3, 4, 9, 13, 14, 15
Sec. 2113 ..... 2, 9, 13

Page

Outer Continental Shelf Lands Act, P. L. 212, 83rd Cong., 1st Sess.; 67 Stat. 462:

Sec. 3 23
Sec. 4 23

U. S. Code, Title 49, Civil Aeronautics Act:

Sec. 401 (21) (a) 20

U. S. Constitution, Fourteenth Amendment 2

Miscellaneous:

House Report No. 413, to accompany H. R. 4198, 83rd Cong., 1st Sess. 22
U. S. Senate, Committee on Interstate Commerce, Hearings, 74th Congress, Vol. 1, page 68 21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, AND PETER E. MITCHELL, MEMBERS OF AND COLLECTIVELY CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, AND J. THOMASON PHELPS, LEGAL ADVISERS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellants,

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UNITED AIR LINES, INC., A CORPORATION; CATALINA AIR TRANSPORT, A CORPORATION; AND THE CIVIL AERONAUTICS BOARD,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF OF APPELLANTS

Additional Argument

I. The lower Court had no jurisdiction to decide this case upon its merits because appellees are subject to no irreparable injury which entitles them to equitable relief and there is no case or controversy which entitles them to declaratory relief.

The only action taken by appellants in connection with appellee air carriers' operations between the mainland of

California and Catalina Island has been (1) to send administrative letters instructing United to file tariffs covering such operations with the State Commission and (2) to inform appellees that if the Federal District Court injunction is dissolved and United still refuses to file tariffs that the State Commission intends to institute an investigation to determine whether it has authority to establish rates for the operations in question, and, if so, to proceed to establish such rates pursuant to law.

Both appellants and appellees agree that appellee air carriers are not in contempt of the State Commission nor subject to penalties under Section 2107 of the Public Utilities Code by reason of United's refusal to file tariffs as instructed in the administrative letters set forth in Appendix B of appellants' brief and R. 37-46. Section 22 of Article XII of the California Constitution only authorizes the State Commission to establish rates.

Appellants agree with appellees that a construction of Section 2107 which would authorize the bringing of penalty actions against United for refusal to comply with the administrative letters in question would violate the Fourteenth Amendment. As appellee air carriers have been so careful to point out, there is no provision in the public Utilities Code for judicial review of administrative letters. Such letters are issued without notice and without hearing.

Sections 2107 and 2113 of the California Public Utilities Code are not in issue in this proceeding.

Appellees nevertheless claim and the lower Court has found that appellee air carriers are subject to a risk that penalties will be imposed under Section 2107 of the Public Utilities Code. Such findings can be based only on the absurd assumption that the State administrative officials in their enforcement of Section 2107 have no right to deter-

mine its proper scope of application but must blindly seek to recover penalties willy-nilly whatever their honest opinion as to the proper application of this Section. The State administrative officials, the same as the State and Federal judicial officers, are bound to apply the provisions of said Section 2107 in accordance with their best conception of its lawful application. The claims of appellee air carriers and the findings of the lower Court that appellee air carriers are subject to the risk of penalties are not supported by the record. We do not believe this Court will be misled by the straw man set up by appellee air carriers.

Appellee air carriers in their brief have indicated that appellants have confused the issues in their opening brief. If appellants have done so, it is only because appellants themselves have been confused by the claims of appellees and the opinion and findings of the lower Court.

For example, Finding 12 states (R. 60-61): "Statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day *that operations are conducted by carriers without effective tariffs being on file with the defendant Public Utilities Commission.*" (Emphasis added.) *No such statutes exist.* Now appellee air carriers in their brief state that the administrative letters instructing United to file tariffs are directives within the meaning of Section 2107 of the Public Utilities Code, and at the same time they say that such an interpretation of Section 2107 would be unconstitutional under the Fourteenth Amendment. Appellants agree that such interpretation would be unconstitutional, and they do not propose so to construe Section 2107.

The lower Court has made no clear finding that the administrative letters in question are enforceable directives within the meaning of the penalty Section 2107. The lower

Court said that it did not even reach the constitutional issue. Nevertheless, without considering the proper application of the penalty provisions of Section 2107 the lower Court in Finding 13 stated (R. 61): "The refusal of the plaintiff United to heretofore comply with the directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has and will subject United to the risk of incurring the mentioned heavy penalties, . . ."

We also wish to point out that the term "instruct" and not "direct" was used in the administrative letters in question. In other words the State Commission was informing United of the State Commission's opinion regarding its authority to establish the rates in question.

The opinion of the lower Court is inconsistent with its findings. The opinion states (R. 48-49): "We do not reach nor decide the issue tendered, that the state statute [Section 2107 of the Public Utilities Code] is unconstitutional. If the cause required the resolution of no other *federal issue*, obviously this court could dissolve itself." Then follows a list of cases on which appellants rely. The lower Court would not have dissolved itself if appellees had raised a *substantial* question regarding the constitutionality of Section 2107 of the Public Utilities Code, the enforcement of which appellees were seeking to enjoin. To dissolve itself the lower Court would have had to determine either (1) that the constitutional question was not substantial, (2) that the statute itself was constitutional even though the proposed application of the statute by the administrative officials might be unconstitutional, or (3) that the Court had no jurisdiction to consider the question.

Appellee air carriers in their brief have stated that if United had filed its tariffs pursuant to the instruction in

the administrative letters the rates in question would have been established, the administrative process would have been completed and the matter would have been at an end. But that is not the case here. By reason of United's refusal to file the tariffs in question the administrative process is only at its inception. Even though United offered its tariffs of the rates in question for filing with the State Commission, the State Commission would have to exercise its administrative expertise in determining whether to accept or reject the proposed tariff filing. If the filing were rejected an administrative hearing might be held to establish the proper rates for the operations in question.

Suppose the present injunction is dissolved, but the State Commission, nevertheless, does not carry out its present intention of holding an investigation proceeding, or suppose it conducts an investigation proceeding but does not require the establishment of the rates in question. In either such event will the appellees be concerned with the instruction set forth in the administrative letters previously referred to? Appellees may speculate that neither such course of conduct on the part of the State Commission is likely in view of the authorities supporting jurisdiction in the State Commission, but until the Commission has completed its quasi-legislative processes there is no statute (we are here referring to a State Commission order issued pursuant to the provisions of the Public Utilities Code) which is subject to attack by complaint for injunction or declaratory relief or both.

In the case of *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U. S. 237, 240-241, this Court said:

> "* * * In addition to defects that will appear in our discussion of declaratory relief, it is wanting in equity because there is no proof of any threatened or probable

act of the defendants which might cause the irreparable injury essential to equitable relief by injunction."

That there was possible injury to the carrier in the *Wycoff* case is apparent from the facts as stated by this Court as follows:

> "In this connection, *Wycoff Co.* v. *Public Service Commission,* 227 P. 2d 323 (1951), is brought to our attention. From this it appears that respondent and its predecessors in interest long made it a practice to obtain from the Utah Commission certificates to authorize this carriage of film commodities between points in Utah. But the Supreme Court of Utah, in the cited case, sustained the Commission in denying such an application upon a finding that the field already was adequately served. We are also told that the Commission filed a petition in Utah state court to enjoin respondent from operating between a few specified locations within the State, but that process was never served and nothing in the record tells us what has happened to this action. We may conjecture that respondent fears some form of administrative or judicial action to prohibit its service on routes wholly within the State without the Commission's leave. What respondent asks is that it win any such case before it is commenced." (344 U. S. 244-245).

In the case now under consideration the State Commission has made no threats or attempts to enjoin appellee air carriers from operating. It is only seeking to be permitted to hold a formal investigation proceeding looking to the establishment of the rates in question if the State Commission determines it has authority to do so.

On page 9 of appellee air carriers' brief in their statement of the facts they point out that in their complaint they alleged:

> "* * * that the Commission claimed that the State statute authorized the bringing of 'numerous suits for so-called reparations in which said defendants claim that all rates or charges collected by plaintiff United Air Lines, Inc., may be recovered together with interest and, if the violation was wilful, with exemplary damages in undefined amounts * * *' "

We wish this Court to note that appellee air carriers failed to maintain their burden of proof in connection with this allegation and that the lower Court consequently made no findings or conclusions in relation thereto. Such allegation was denied in appellants' answer and we here reiterate that such allegation is untrue.

On page 26 of their brief appellee air carriers state that appellants have overlooked the following statement of Judge Murphy relating to threat of irreparable injury:

> "* * * the nub of our decision. We held as a matter of fact, intent is a question of fact, that you had threatened irreparable injury. We found that."

This statement has not been overlooked but perhaps should be further explained. As previously stated on page 7 of our jurisdictional statement the lower Court struck the following language from the proposed findings:

> "* * * Subsequently, on February 27, 1952, the defendant Everett C. McKeage, Chief Counsel for the defendant Commission, verbally advised counsel for United that suits would be brought to recover penalties against United for its failure to file its mentioned tariffs with the Commission."

Hence, the threat to which Judge Murphy made reference was undoubtedly the admitted intention of the State Com-

mission to institute a formal quasi-legislative investigative proceeding inquiring into the establishment of rates for the transportation in question. We have previously shown in our opening brief, pages 24-25, that such a proceeding will not subject appellee air carriers to such irreparable injury as will entitle them to equitable relief.

In facing up to the burden of establishing that the lower Court's finding, that appellee air carriers are subject to a threat of irreparable injury, is not supported by the record, appellants are willing to stipulate that they will bring no penalty actions or contempt proceedings against United Air Lines, Inc., or Catalina Air Transport with respect to their failure to file tariffs covering the Catalina operations here in question unless the following conditions obtain:

1. There shall be a final decision ordering appellee air carriers, or either of them, to file tariffs covering their operations here in question, which final decision shall have arisen out of a proceeding instituted before the State Commission for the purpose of subjecting said air carriers' rates and charges in question to the jurisdiction of the State Commission, and

2. Said air carriers, or either of them, shall thereafter refuse to file such tariffs as directed by said decision.

Even under such circumstances penalties will not be sought and contempt proceedings will not be instituted for any refusal to file tariffs covering the rates and charges in question prior to the finality of the State Commission's said decision.

This offer of stipulation should not be construed as an indication that penalty actions or contempt proceedings necessarily will be instituted under the circumstances stated in the stipulation.

During the trial of the case a somewhat similar stipula-

tion was offered by appellants and rejected by appellee air carriers (R. 179).

The investigatory powers of the State Commission are not limited to the investigation of matters over which it presently has jurisdiction. It may conduct an investigative proceeding to determine whether it does or should have jurisdiction. Even though it concludes that it does not have jurisdiction over the matters of the investigation the State Commission may make findings and recommendations regarding proposed legislation relating thereto.

We are pleased to note that the brief for the Civil Aeronautics Board has confined itself to the merits, and that the Government has not urged this Court to determine that the amounts which appellee air carriers may expend in responding to a subsequent investigation before the State Commission are the proper subject matter of this action and constitute such irreparable injury as will entitle appellee air carriers to equitable and declaratory relief. *A redetermination of this issue in favor of appellant is of vital concern both to Federal and State administrative agencies alike.*

We again respectfully submit that the lower Court had no jurisdiction to decide this case on its merits because appellees are subject to no irreparable injury which will entitle them to equitable relief and there is no case or controversy which will entitle them to a declaratory judgment.

II. Until the administrative processes of the State Commission are exhausted the State and Federal Courts have no jurisdiction.

The hue and cry now being raised by the appellee air carriers about the penalty provisions of Section 2107 of the Public Utilities Code and the contempt provisions of Section 2113 of said Code is a smoke screen calculated to divert this Court's attention from the real and decisive issue in this case *which is the doctrine of the exhaustion of adminis-*

trative remedies. This latter issue is a jurisdictional hurdle over which appellees seek to spring by minimizing it and magnifying the make-weight issue of irreparable injury.

We agree with appellee air carriers that one of the basic reasons underlying the doctrine of exhaustion of administrative remedies is to take full advantage of administrative expertness, and to insure that the administrative agency has an opportunity first to decide the questions involved.

Appellee air carriers on page 42 of their brief state that we are here not concerned with a *rate case. That is exactly what we are concerned with.* Does anyone think that if the State Commission is permitted to hold a formal investigatory proceeding and determines that it has jurisdiction to establish the rates in question that the proceeding will stop there? Of course, not. In such event the State Commission will in the exercise of its administrative expertness establish the rates in question. *Without exhaustion of the admininstrative process the Federal Court did not have the entire case before it for consideration.*

Another basic reason for the requirement of the exhaustion of the administrative process is *to maintain and preserve orderly procedure.* The present proceeding is a good example of the complications which may develop when that orderly procedure is not followed.

In the case of *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802, this Court, by a *per curiam* opinion, reversed the Court of Appeals of the District of Columbia, 156 Fed. 2d 821, which latter Court had reversed the District Court for the District of Columbia, 60 F. Supp. 907. This Court held that the utility had not exhausted its administrative remedies and was not, therefore, entitled to either declaratory or injunctive relief, although the record showed that the Federal Power Commission had issued against the utility an order to show cause and a supplemental order to show cause why the utility should not be required to make a very substantial reclassification of

its accounts and, further, ordered the utility to respond under oath to certain matters and to present a plan for the disposition of substantial amounts reflected in the utility's adjustment accounts. For the purpose of the orders to show cause, the Federal Power Commission assumed that it had jurisdiction and issued orders and directives to the utility. Notwithstanding these facts, this Court held that neither declaratory nor injunctive relief was availbale to the utilty because it had not exhausted its administrative remedies before the Federal Power Commission. The utility contended that the State authority had exclusive jurisdiction over the subject matter of the case (exclusive authority over accounts) and that the Federal Power Commission was without jurisdiction. State authority made the same contention and had actually exercised its asserted jurisdiction. Ninety-eight percent of the business of the utility was purely intrastate.

In this case, the Court of Appeals pointed out that no final order had been issued by the Federal Power Commission and, therefore, the utility could not appeal from the action thus far taken by said Commission and advanced this fact as a justification for judicial relief. The Court of Appeals, in reversing the District Court's dismissal of the complaint by the utility for injunction and declaratory relief, observed that a hearing before the Federal Power Commission would be a mere formality for the reason that it appeared that the Federal Power Commission's action clearly foreshadowed that said Commission was of the opinion that it had exclusive jurisdiction over the primary accounts of the utility. The United States Supreme Court, nevertheless, held in a *per curiam* decision that the utility had not exhausted its administrative remedies before the Federal Power Commission and reversed the judgment of the Court of Appeals.

It is a rule of law, generally recognized, that a court or other adjudicatory tribunal is not disqualified to pass upon

a petition for rehearing or a motion for a new trial just because the same court or other tribunal rendered the decision respecting which such rehearing or new trial is asked. The same rule prevails where a court has decided an important legal principle in one case and a subsequent case comes before it involving the same principle. The court is not disqualified or considered biased in the later case.

In California, a party *must* file a petition for rehearing respecting the decision of the State Public Utilities Commission as a condition precedent to seeking judicial review and in the petition for rehearing must set out any ground upon which he will rely in seeking judicial review (Sections 1731-1732 of the Public Utilities Code). Filing a petition for rehearing is not considered to be an idle or useless act.

It is the law in California that, where a party is entitled to although not required to file a petition for rehearing with an administrative agency, such filing of a petition for rehearing is a jurisdictional condition precedent to judicial review, although there is no statutory specification or provision on the point. This rule is a judicially created one. *Alexander* v. *State Personnel Board*, 22 Cal. 2d 198, 199-200.

The rule as to exhaustion of administrative remedies as a condition precedent to judicial review is jurisdictional in California. *U. S.* v. *Superior Court*, 19 Cal. 2d 189; *Abelleira* v. *District Court of Appeal*, 17 Cal. 2d 280.

III. As an adequate remedy exists in the courts of the State of California for the purpose of reviewing any order issued by the State Commission pertaining to the subject matter of this action, the Federal District Court should have refused to exercise jurisdiction in this case.

We wish to point out an inconsistency in appellee air carriers' brief. On pages 33-34 they argue that the administrative letters in question are orders which were issued after

hearing and reissued after rehearing. The contrary argument is made concerning the Johnson Act on pages 49-50 where they contend that no hearing has been given with respect to the subject matter of the administrative letters.

Appellee air carriers on pages 43-44 of their brief have shown that the administrative letters under consideration in this case are not subject to judicial review by the California Supreme Court because they are not decisions or orders of the Commission. They are only unenforceable instructions, and no purpose would be served by their review. We ask why should appellee air carriers want to have these letters reviewed and why did the lower Federal court review them? Appellee air carriers state on page 55 of their answering brief that exhaustion of the administrative remedies and state review will be the exhaustion of the litigants. Appellants would remind them that judicial review in the Federal courts can be exhausting, too.

For purposes of applying Sections 2107 and 2113 of the California Public Utilities Code the State Commission has consistently construed the terms "rule", "regulation", "direction", "demand", or "requirement" as being synonomous to a formal decision or order of the State Commission. We again point out to this Court that when this Commission has issued an enforceable "direction", "demand", or "requirement" in the form of an order or decision, the laws of the State of California provide for speedy and adequate review in the State courts (Sections 1756-1767, Public Utilities Code) and the Federal laws provide for speedy and adequate review in this Court, if necessary.

Appellee air carriers state on page 52 of their answering brief:

> "But none of the considerations underlying the doctrine of equitable abstention present in *Pullman*, *Burford*, *Alabama*, and *Wycoff*, are involved in this case. There are no questions concerning a specialized

> field of state law with which federal judges are not familiar. There is no need for administrative expertise to solve this dispute. There are no unresolved questions of State law. . . ."

We vigorously disagree. By reason of the lower Court's apparent finding that the administrative letters in question are final administrative directives which subject appellee air carriers to the risk of penalty suits and contempt proceedings contrary to the real effect of such letters, there are numerous unresolved state issues involved in this proceeding.

The first is what effect should be given to the administrative letters in question? Are they final enforceable administrative directives under the State Constitution and statutes? If so, how are they enforceable? By contempt proceedings before the State Commission? By the institution of penalty actions under Section 2107 of the Public Utilities Code? Is Section 2107 applicable to air carriers? This same question is now before the California Supreme Court for determination in two cases which it has under consideration, appellee United being a party to one of the actions. Assuming the administrative letters are final enforceable directives are they reviewable by the California Supreme Court as orders of the State Commission? Are Sections 170 and 171 of the California Government Code which clarify the territorial boundaries of the State of California, valid under the California Constitution? The initial determination of these State issues can best be made by the State courts.

If the State issues are resolved in favor of appellees by the State courts, the Federal courts may not have to concern themselves with the Federal issues. *If necessary, the Federal issues can be resolved by this Court with the record clear of the various State issues.*

In the view of appellants the lower Federal court has already made several erroneous determinations with re-

spect to the State law here involved. It has found that the State statutes impose penalties upon United for failure to file tariffs with the State Commission. It apparently has found that the administraitve letters are directives within the meaning of Section 2107 of the California Public Utilities Code. In finding that no adequate remedies exist in the State courts it apparently has found that even though the administrative letters may be enforceable under the State law by penalty actions such letters are not orders which are reviewable by the California Supreme Court. By finding that a portion of the waters between the mainland of California and Catalina Island are not within the boundaries of the State of California it impliedly decided that Sections 170 and 171 of the California Government Code are in violation of the provisions of the California Constitution.

Appellee air carriers do not want to maintain that delicate balance which exists in the relationship between the Federal and State governments. They want to tip the scales to complete Federal control. Their position was made clear in United's brief filed with this Court in the case of *United Air Lines* v. *Commission*, 342 U. S. 908. However, at page 74 of their brief, appellee air carriers state that they do not, in this proceeding, contend that Federal authority has superseded State authority as applied to economic regulation of intrastate operations of air carriers. They say that the operations here concerned are interstate air transportation as defined by the Federal act.

Their strange conception of the delicate balance which they think should exist is well set forth in their brief in the instant proceeding, pages 50-55, wherein they say, on the one hand, that the Federal District Court should not permit the Civil Aeronautics Board to be placed in a position where it might find it desirable and advisable to intervene in a proceeding before the State Commission, but, on the other hand, that the State Commission had the opportunity to and should have intervened in the proceedings in which the certificates of public convenience and necessity

covering the route in question were granted and renewed to appellees by the Civil Aeronautics Board.

IV. The route in question is wholly within the boundaries of the State of California, and the rates in question are intrastate rates which may be established by the State Commission.

Section 1 of Article XII of the California Constitution of 1849 defines the westward boundary of the State of California as follows:

> "Section 1. The boundary of the State of California shall be as follows: . . . thence running west and along said boundary line, to the Pacific Ocean, and extending therein three English miles; thence, running in a northwestererly direction and following the direction of the Pacific Coast, to the forty-second degree of north latitude; thence, on the line of said forty-second degree of north latitude, to the place of beginning. Also all the islands, harbors, and bays along and adjacent to the coast."

The California Constitution of 1849 which included the above definition of its boundaries was presented to the Congress of the United States on February 13, 1850. The Congress accepted the California Constitution and passed the Act of Admission. (Act of Sept. 9, 1850, 9 Stat. 452.)

The phrase "*Also all the islands, harbors, and bays along and adjacent to the coast.*" is a phrase which *is a part of the definition of the boundaries of the State of California.* It is not a phrase stating that such islands, harbors, and bays shall be a part of the State of California in addition to the lands and waters included within the previously defined boundaries of the State.

The westerly boundary of California begins at a point on the southern boundary line which is three English miles from the Pacific Coast and runs in a northwesterly direction

and follows not the "Pacific Coast" but the "direction of the Pacific Coast" three English miles in the Pacific Ocean beyond the Pacific Coast and "all the islands, harbors, and bays along and adjacent to the coast."

All the lands and waters (including San Pedro Channel between the Pacific Coast and Catalina Island) included within the boundaries of the State of California as so defined are a part of the State of California and a part of the United States of America.

Sections 170 and 171 of the California Government Code do not purport to extend the boundaries of the State of California beyond the boundaries of the United States. These sections of the Government Code define the boundaries of the State as they were defined in Section 1 of Article XII of the California Constitution of 1849 in terms which will not be misconstrued in the manner appellee air carriers, the Civil Aeronautics Board, and the lower Federal Court have misconstrued the provisions of said Section 1 of Article XII of the original Constitution of California.

Section 1 of Article XXI of the present California Constitution is the same as Section 1 of Article XII of the original California Constitution of 1849 except that the phrase was revised to read: "Also *including* all islands, harbors, and bays along and adjacent to the coast." (Emphasis added.)

In determining that the bay of Monterey, which is a body of water having headlands approximately eighteen miles apart and a total depth of approximately nine miles, is within the boundaries of the State of California, the California Supreme Court had the following to say regarding the boundaries of the State, *Ocean Industries, Inc.* v. *Superior Court*, 200 Cal. 235, 242-243:

> "It is needless to detail the history of the increasingly troubled effort of Spain and later of Mexico to assert and maintain the sovereignty of each in turn

over the indefinite region known as California and its adjacent islands, inlets and seas; but the interesting fact may be noted as having its bearing upon whatever question of international law is involved herein that the dispute between Spain and England in the year 1790 growing out of the northwest coast fur trade was for the time being settled by the so-called Nootka Convention, wherein as between these two powers, which were then the greatest maritime powers of the known world, *it was agreed that the exclusive sovereignty of Spain should be recognized and respected over all parts of the northwest coast already occupied by subjects of Spain for a distance of ten leagues into the ocean. The agreements of this convention were ratified by the contracting powers and the claims of Spain to exclusive sovereignty and jurisdiction over the coasts of what is now California and Oregon as far north as the mouth of the Columbia River on land and to a distance of ten leagues into the ocean were conceded and confirmed.* [Emphasis added.]

"This jurisdiction over these coasts and seas and adjacent islands Spain and her successor Mexico thereafter asserted and insisted upon through rigid maritime regulations over the increasing coastal traffic during the half century or so following the date of said treaty and down to the time of the occurrence of the war between the United States and Mexico and consequent seizure of California by the former, manifested by the raising of the American flag at Monterey on July 7, 1846, and by the subsequent events which marked the passing of the old dominion. *By the terms of the treaty of Guadalupe Hidalgo, which was finally ratified at the city of Queretaro on May 30, 1848, Mexico ceded to the United States all territory lying to the northward of a line drawn from the mouth of the Rio Grande westerly to the Pacific Ocean. By virtue of this treaty the United States assumed that jurisdiction over the region thus ceded, both territorial and maritime, which Mexico had theretofore asserted, and which embraced all of the ports, harbors, bays, and inlets along the coast of Cali-*

fornia and for a considerable though perhaps indefinite distance into the ocean, including dominion over the numerous islands lying therein adjacent to said coast. [Emphasis added.]

"When in the course of events the duly constituted framers of the constitution of California assembled at Monterey in the autumn of 1849 and proceeded to frame the first constitution of California they inserted in article XII thereof a description of the boundaries of the state which, in so far as the southerly and westerly lines thereof were concerned, read as follows: 'Thence running west and along said boundary line [the Mexican boundary] to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. *Also all the islands, harbors and bays along and adjacent to the coast.*' This language in our first constitution, particularly in view of the past political history of the region, would seem to be too clear to admit of any doubt as to its meaning or that it was intended to embrace within the boundaries and jurisdiction of the state of California the entire area of all those several bays and harbors which indent its coast. . . ."

Similarly the language of the first constitution of California in view of the past political history of California would clearly seem to include within the boundaries of the State of California the Island of Catalina and the waters of San Pedro Channel intervening between the mainland of California and Catalina Island.

We also wish to point out that the case of *United States* v. *California*, 332 U. S. 19, involved a complaint to determine the ownership of submerged lands off the coast of California between the low water mark and the three-mile limit. The fact that this Court found that such ownership was vested

in the United States does not preclude this Court from finding that the intervening waters between the mainland of California and Catalina Island are within the boundaries of the State of California, or that in any event the rates of air carriers for transportation wholly between the mainland of California and Catalina Island may be established by the State Commission pursuant to the provisions of Section 22 of Article XII of the State Constitution. In fact this Court conceded that the State has been authorized to exercise local police power functions in the part of the marginal belt within its declared boundaries.

The establishment of the rates in question by the State Commission will be a lawful exercise of such local police power functions.

V. Neither through the enactment of the Civil Aeronautics Act nor through the enactment of the Outer Continental Shelf Lands Act has the Congress preempted the authority of the State Commission to establish rates for the transportation in question.

The legislative history of Section 1(21)(a) of the Civil Aeronautics Act 49 U. S. C. 401(21)(a) shows that the Congress intended to authorize the Civil Aeronautics Board to regulate rates for transportation between points in the same state over that portion of the high seas where international or interstate relationships are involved in which case there is the same need for Federal regulation as exists when the transportation is between places in the same state over another state.

The need for Federal regulation of the rates for transportation between the mainland of California and Catalina Island which passes over seas local to if not within the territorial boundaries of the State of California is not the same as the need for Federal regulation of rates for transportation between points in the State of California over the

State of Nevada, for example. In other words the rates for such transportation being a matter of local concern to the people of the State of California, the transportation over the route in question is within the jurisdictional boundaries, if not the geographical boundaries, of the State of California, and does not go over *a place outside thereof* within the meaning of Section 1(21)(a) of the Civil Aeronautics Act. Hence the State Commission can regulate the rates for transportation between the mainland of California and Catalina Island.

To satisfy appellee air carriers we again refer to the authorities in support of the foregoing:

U. S. Senate, Committee on Interstate Commerce, Hearings, 74th Congress, Vol. 1, page 68, *Letter from Joseph B. Eastman, Federal Coordinator of Transportation, to Senator Burton K. Wheeler;*

Wilmington Transportation Co. v. *Railroad Commission,* 236 U. S. 151, 156;

United Air Lines, Inc., et al., 50 Cal. P. U. C. 563; review denied, *United Air Lines* v. *Commission,* 37 A. C. 633, 1; appeal dismissed, *United Air Lines* v. *Commission,* 342 U. S. 908.

In the event the route in question passed over the high seas within the extended boundary lines of an adjacent sister state or foreign country perhaps this Court would hold that the operation was no longer solely of local concern to the people of the State of California and hence that the rates therefore could not be regulated by California. In such case the same need for Federal regulation might exist as in the situation where the flight passes between points in California but over the State of Nevada, for example.

On page 14 of the brief for the Civil Aeronautics Board the Civil Aeronautics Board declares that as the deepest part of San Pedro Channel is in excess of 450 fathoms that it

is beyond the outer Continental Shelf as defined in the Outer Continental Shelf Lands Act, P. L. 212, 83rd Cong., 1st Session, 67 Stat. 462.

We have reviewed House Report No. 413, to accompany H. R. 4198 and find no reference to the boundaries of the outer Continental Shelf of the United States along the Pacific Coast States. True enough House Report No. 413 to accompany H. R. 4198 contains the statement: "Generally this abrupt drop occurs where the water reaches a depth of 100 fathoms or 600 feet, and, for convenience, this depth is used as a rule of thumb in defining the outer limits of the shelf." But the report also continues: "Along the Atlantic coast, the maximum distance from the shore to the outer edge of the shelf is 250 miles and the average distance is about 70 miles. In the Gulf of Mexico, the maximum distance is 200 miles and the average is about 93 miles * * *"

This Court will take judicial notice of the fact that conditions along the Atlantic Coast are different from those along the Pacific Coast. For example, the Atlantic Coast is sinking, whereas the Pacific Coast is rising. Also along the Atlantic Coast there are no islands belonging to the United States comparable to Catalina and the chain of large islands along the Pacific Coast. It is inconceivable to appellants that the President of the United States would exclude any portion of San Pedro Channel from the outer Continental Shelf in determining and publishing the boundaries in the Federal Register as directed in Section 4 of the Outer Continental Shelf Lands Act, assuming that some portion of San Pedro Channel is not within the geographical boundaries of the State of California.

There is no question that the lands and waters of San Pedro Channel historically are a part of the United States. Through the enactment of the Outer Continental Shelf Lands Act, Congress did not intend to give up claims to the lands and waters between the mainland of California and

Catalina Island. Even though this Court find that portions of San Pedro Channel are not within the geographic boundaries of the State of California surely there will be no finding that any of the lands beneath San Pedro Channel do not appertain to the United States and are not subject to its jurisdiction and control.

Section 3 of the Outer Continental Shelf Lands Act provides:

"Sec. 3. Jurisdiction Over Outer Continental Shelf. —(a) It is hereby declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this Act.

"(b) This Act shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected."

Section 4 of this Act in part provides as follows:

"Sec. 4. Laws Applicable to Outer Continental Shelf.—(a) (1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this Act.

"(2) To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of the effective date of this Act are hereby

declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf."

We have demonstrated that the provisions of the California Constitution authorizing the State Commission to establish rates for the operations in question are not inconsistent with the Federal law. The provisions of the Outer Continental Shelf Lands Act makes this State law the law of the United States in so far as the outer Continental Shelf off the Coast of California is concerned. The only difference is that transactions concerning these rates within the boundaries of the State of California will be governed by State law administered by State officials whereas transactions concerning these rates within the outer Continental Shelf in the area bounded by the seaward extended boundaries of the State of California will be governed by State law administered by Federal officials and courts. In both cases the establishment of the rates which is legislative in character and amounts to the enactment of law will be performed by the State officials in so far as they involve transportation between points both of which are within the State of California even though the route may pass over the outer Continental Shelf lands within the extended boundaries of the State of California.

We submit that neither through the enactment of the Civil Aeronautics Act nor through the enactment of the Outer Continental Shelf Lands Act has the Congress preempted

the authority of the State Commission to establish rates for the operations in question.

Conclusion

In view of the foregoing additional argument we again respectfully submit that this Court should dispose of this case on the procedural grounds, heretofore urged, which are of jurisdictional substance. If the merits of this case are reached, we further respectfully submit that the final decision must nevertheless be in favor of appellants.

Dated, November 12, 1953.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~823~~ 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, ET AL.,

Appellants,

vs.

UNITED AIR LINES, INC., CATALINA AIR TRANSPORT AND CIVIL AERONAUTICS BOARD

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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INDEX

Subject Index

	Page
Statement opposing jurisdiction and motion to dismiss or affirm	1
Statement of issues on appeal	2
The Court below had and properly exercised jurisdiction in this case	6
A. The jurisdiction of the Three-Judge Court	6
B. Jurisdiction of the District Court	8
C. This Court's recent decision in *Public Service Commission of Utah* v. *Wyckoff*	14
The Civil Aeronautics Act vests exclusive jurisdiction over the California-Catalina route in the Civil Aeronautics Board	19
The air space through which appellees' flights traverse on the California-Catalina route are over waters outside California, and accordingly constitute interstate air transportation	22

Table of Cases Cited

Alabama Public Service Commission v. *Southern Ry. Co.*, 341 U.S. 341	9
Bethlehem Steel Corp. v. N. Y. State Labor Relations Board, 330 U.S. 767	17
California Water Service Co. v. *Redding*, 304 U.S. 252	7
Catalina Air Service to Santa Catalina Island, 2 C.A.B. 798, 6 C.A.B. 1041	3
City Bank Farmers Trust Co. v. *Schnader*, 291 U.S. 29	12
Cloverleaf Butter Co. v. *Patterson*, 315 U. S. 148	10
Cornell Steamboat Co. v. *United States*, 321 U.S. 634	19
Gully v. *Interstate Natural Gas Co.*, 292 U.S. 16	8
Hines v. *Davidowitz*, 312 U.S. 52	10

Page

Lord v. *Steamship Co.*, 102 U.S. 541 19
Matthews v. *Rodgers*, 284 U.S. 521 10
Mayo v. *United States*, 319 U.S. 441 10
Napier v. *Atlantic Coast Line R. Co.*, 272 U.S. 605 10
Northwest Airlines v. *Minnesota*, 322 U.S. 292 21
Oklahoma Gas & Electric Co. v. *Oklahoma Packing Co.*, 292 U.S. 386 8
Pacific Coast Steam-Ship Co. v. *Board of Railroad Commissioners*, 18 Fed. 10 19
Propper v. *Clark*, 337 U.S. 472 9
Public Service Commission of Missouri, et al. v. *Brashear Freight Lines, Inc., et al.*, 312 U.S. 621 7
Public Service Commission of Utah v. *Wycoff*, 344 U.S. 237 14
Public Utilities Commission of Ohio v. *United Fuel Gas Co.*, 317 U.S. 456 17
Railroad Commission v. *Pacific Gas & Electric Co.*, 302 U.S. 388 7
Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 10
Simpson v. *Shepard*, 230 U.S. 352 22
Stainback v. *Mo Hock Ke Loh Po*, 336 U. S. 368 8
Sterling v. *Constantin*, 287 U.S. 378 7
United Air Lines Operation of Catalina Air Transport, 6 C.A.B. 1041 4
United Air Lines, Inc. v. *P.U.C. of California*, 109 F. Supp. 15 6
Wilmington-Catalina, Grandfather Certificate, 1, C.A.A. 431 2
Wilmington Transportation Co. v. *Railroad Commission of California*, 166 U.S. 741, 137 P. 1153, 236 U.S. 151 22

STATUTES CITED

California Public Utilities Code, Section 2107 6
Constitution of California, Article XII, Section 20 13
Constitution of the United States:
Article VI, Cl. 2 22
14th Amendment 5
Johnson Act, 28 U.S.C.A. 1342 23
Senate Bill 3027, 74th Congress, 1st Sess. 1935 19

Page

United States Code:

Title 28:

Section 1253 5
Section 1331 8
Section 1337 9
Section 2281 ..... 5, 6
Section 2284 5

Title 49:

Section 401 3
Section 481 20
Section 483 14
Section 484 20
Section 487 21
Section 488 20
Section 491 20
Section 492 20
Section 622 14
Section 642 20

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Case No. 31638

UNITED AIR LINES, INC., A CORPORATION; AND CATALINA AIR TRANSPORT, A CORPORATION,
Plaintiffs-Appellees

CIVIL AERONAUTICS BOARD,
Intervenor

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, AND PETER E. MITCHELL, MEMBERS OF AND COLLECTIVELY CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, AND J. THOMASON PHELPS, LEGAL ADVISERS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Defendants-Appellants

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

United Air Lines, Inc., a corporation, and Catalina Air Transport, a corporation, Appellees, present this joint

statement in opposition to Appellants' Statement as to Jurisdiction herein, and move that the within appeal be dismissed or that the judgment of the District Court be affirmed. In support of their motion to dismiss or affirm, Appellees respectfully show the following:

I. Statement of Issues on Appeal

On October 13, 1939 the Civil Aeronautics Authority, now known as the Civil Aeronautics Board, issued a certificate of public convenience and necessity to Wilmington-Catalina Airlines, Ltd., the predecessor of Appellee Catalina Air Transport, authorizing the air transportation of persons and property between Wilmington, on the mainland of California, and Avalon, on Santa Catalina Island. Santa Catalina Island is located in the Pacific Ocean, and is a part of the State of California. The distance between the shorelines of the Island and of the mainland of California is 30 miles.

The award of the certificate to Wilmington-Catalina Airlines, Ltd., was based upon findings that the boundaries of California did not extend beyond a distance of 3 miles from the shoreline of the mainland, and beyond a distance of 3 miles from the shoreline of Santa Catalina Island. Since aircraft flying between Wilmington and Avalon were required to fly over approximately 24 miles of water not within the boundaries of the State of California, the Board concluded that common carrier transportation by aircraft between these points constituted interstate air transportation, as defined by the Civil Aeronautics Act. *Wilmington-Catalina Air, Grandfather Certificate,* 1 C. A. A. 431.

The Civil Aeronautics Act defines "interstate air transportation" to include, among other things, "the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce between * * *

places in the same State of the United States through the air space over any place outside thereof . . .", 49 U. S. C. 401 (21)(a).

On July 22, 1941, the Civil Aeronautics Board extended the route of Wilmington-Catalina Airlines, Ltd. to Los Angeles, authorizing the carrier to conduct operations between Los Angeles and Avalon via the intermediate point of Wilmington. At the same time the Board reissued the certificate in its entirety to reflect the change of the carrier's name from Wilmington-Catalina Airlines, Ltd. to Catalina Air Transport. *Catalina Air, Service to Santa Catalina Island,* 2 C. A. B. 798. This amended certificate has ever since continued in full force and effect.

Operations were conducted continuously by Wilmington-Catalina Airlines, Ltd. and by Catalina Air Transport over these routes in accordance with the certificates of public convenience and necessity issued by the Civil Aeronautics Board from October 13, 1939 until the carriers' equipment was requisitioned by the United States Government for military purposes in 1942. Following this requisition, the Board authorized a temporary suspension of operations which continued for the duration of World War II. See 6 C. A. B. 1041, 1043 (1946).

During all periods of operation by Wilmington-Catalina Airlines, Ltd. and its successor, Catalina Air Transport, tariffs for the carriage of persons and property were maintained on file with the Civil Aeronautics Board and operations were conducted under the regulatory control of the Civil Aeronautics Board. Tariffs were at no time filed with the Appellant Public Utilities Commission of California.

On June 3, 1946, the Civil Aeronautics Board approved an operating contract between Appellee United Air Lines, Inc. and Catalina Air Transport, dated March 7, 1946, under which United agreed to perform and discharge all of

the obligations of Catalina Air Transport under its certificate of public convenience and necessity. *United Air Lines, Operation of Catalina Air Transport,* 6 C. A. B. 1041. Various supplemental agreements relating to the rates and fares to be charged to the public for the transportation provided by United were filed with, and subsequently approved by, the Board, together with various other agreements relating to miscellaneous details of the operation. This operating contract, and the approval thereof by the Board, has been continuously in effect since June 3, 1946, and operations have been and are being conducted by United thereunder. Tariffs for the carriage of persons and property have been, and are, maintained on file by United with the Civil Aeronautics Board, and operations have been, and are being, otherwise conducted by United under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board.

During the entire period of operation of the route described above, the exclusive jurisdiction of the Civil Aeronautics Board remained unchallenged. However, on September 20, 1951, the Public Utilities Commission of California notified Appellee United by letter that it claimed jurisdiction over the route "it being intrastate" and went on to say:

> "Therefore, you are instructed to file with this Commission the tariffs covering the service in question."

On December 27, 1951 the Commission again "instructed" United by letter "to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles." Faced with conflicting claims of jurisdiction over its route by State and Federal agencies and with the prospect of incurring penalties up to $2,000 for each day that its tariffs were not on file with the Public Utilities Commission, Appellees brought this action in the United States

District Court for the Northern District of California, seeking to restrain the Commission from bringing any proceeding for the recovery of penalties alleged to be due under the laws of California by reason of Appellees' failure to file tariffs with the Commission covering such route on the ground that such penalties were unconstitutional under the Fourteenth Amendment of the Federal Constitution. In addition, Appellees sought a declaratory judgment that exclusive jurisdiction over the operation of the route was vested in the Civil Aeronautics Board under the Civil Aeronautics Act and that the Public Utilities Commission of California had no authority to compel Appellees to file its tariffs with the Commission. A three-judge court was convened, pursuant to 28 U.S.C. Secs. 2281, 2284. The Civil Aeronautics Board intervened as a plaintiff in the case, taking the position that its jurisdiction over the operations was exclusive under the terms of the Civil Aeronautics Act. The court unanimously decided the case in favor of the Appellees, ruling that the Civil Aeronautics Board has exclusive jurisdiction over the operations involved, that Appellants have no jurisdiction over these operations, and restraining Appellants from interfering with the paramount jurisdiction of the Civil Aeronautics Board. The case is now in this Court on direct appeal, pursuant to 28 U.S.C. Sec. 1253.

There are two main issues presented at this juncture of the case. The first arises from Appellants' contention that Federal jurisdiction is lacking over the proceeding, and the second presents the question whether, by the provisions of the Civil Aeronautics Act and the actions of the Board thereunder, the United States has assumed exclusive jurisdiction to regulate operations over the subject route.

II. The Court Below Had and Properly Exercised Jurisdiction in This Case

A. *The Jurisdiction of the Three-Judge Court*

28 U.S.C. Sec. 2281 provides that a three-judge court must be convened in an action to secure an

> "interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes . . . upon the ground of the unconstitutionality of such statute. . . ."

In this case Appellees challenged the constitutionality of Sec. 2107 of the California Public Utilities Code which subjects a public utility (as defined in such Code) to penalties up to $2,000 per day for failure to comply with "any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the Commission . . ." Consequently, a three-judge court was properly convened to hear and determine the cause. After hearing, the court in its opinion remarked that:

> "The Supreme Court has made the frequent admonition that federal courts should refrain from invalidating statutes on the constitutional grounds when there are other adequate grounds for decision (citing cases)."

and then went on to state, at 109 F. Supp. 15:

> "We do not reach nor decide the issue tendered, that the state statute is unconstitutional. If the cause required the resolution of no other *federal issue*, obviously this court could dissolve itself. See Bowles v. Case, 9 Cir. 149 Fed. 2d 777; affirmed 327 U.S. 92; Ex parte Bransford, 310 U.S. 354; cf. Farmers Gin Co. v. Hayes, 54 Fed. Supp. 43.

"But there are other adequate bases of federal jurisdiction. 28 USC §§ 1331, 1337; 28 USC § 2201. Such being the case, this Court, having properly acquired jurisdiction, has power to consider and dispose of all questions involved in the suit. Louisville & Nashville Railroad Co. v. Garrett, 231 U.S. 298; Fireman's Ins. Co. v. Beha D. C. 30 Fed. 2d 539; Fisher v. Brucker D.C. 41 Fed. 2d 774."

The court then proceeded to the questions whether Congress had pre-empted the field of regulation of interstate air transportation when it enacted the Civil Aeronautics Act, and whether the operation of the California-Catalina route constituted "interstate air transportation" within the meaning of the Act.

Appellees maintain that the action of the court below was correct because the jurisdiction of a three-judge court existing by reason of the presence of a substantial constitutional question "extends to every question of law involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." *Sterling* v. *Constantin*, 287 U.S. 378, 393-394 (1932); *California Water Service Co.* v. *Redding*, 304 U.S. 252, 255-256 (1938). "A District Court composed of three judges under §266 of course has jurisdiction to determine every question involved in the litigation pertaining to the prayer for an injunction, in order that a single lawsuit may afford final and authoritative decision of the controversy between the parties." *Public Service Commission of Missouri et al.* v. *Brashear Freight Lines, Inc. et al.*, 312 U.S. 621, 625 (1941). See also *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 391 (1938). Having already heard argument, the court was familiar with all aspects of the case and was accordingly in a position to render a final and authoritative decision of the controversy. If the court were to have dissolved itself,

as Appellants now contend it should, the effect would have been to prolong the litigation, increase the burdens and expenses of the parties, and leave a cloud over the jurisdiction long exercised by the Civil Aeronautics Board over an important segment of air transportation. Appellees submit that the court below acted properly, in the interests of sound judicial administration, in retaining jurisdiction and in promptly and expeditiously reaching a decision.[1]

B. *Jurisdiction of the District Court*

As we understand Appellants' contentions, their position is not only that three-judge court jurisdiction was lacking under 28 U.S.C. Sec. 2281, but that there was no basis of Federal substantive jurisdiction, even in a one-judge District Court. In making this argument, Appellants contend that Appellees failed to exhaust their State administrative remedies and that Appellees failed to establish irreparable injury entitling them to injunctive relief. We submit that Appellants' contentions with respect to Federal substantive jurisdiction are wholly lacking in merit.

Secs. 1331 and 1337 of Title 28, United States Code, provide:

Sec. 1331:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest

[1] If this Court should decide that the three-judge court was improperly convened, or that even though properly convened, the three-judge court should have dissolved itself after deciding that it was unnecessary to decide the constitutional question, the judgment below is nevertheless "the final order of the district court. . . ." *Stainback* v. *Mo Hock Ke Loh Po*, 336 U.S. 368, 381 (1949). The only effect of such a decision would be to eliminate the jurisdictional basis under 28 U.S.C. Sec. 1253 for a direct appeal to this Court. *Gully* v. *Interstate Nat. Gas Co.*, 292 U.S. 16, 19 (1933); *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U.S. 386, 392 (1933).

and costs, and arises under the Constitution, laws or treaties of the United States."

Sec. 1337:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

In view of these provisions there can be no question that proper Federal jurisdiction exists in this case involving, as it does, claims arising under the Federal Constitution and Federal statutes. Appellants' arguments, therefore, are really directed against the exercise, rather than the existence, of Federal jurisdiction. The precise issue is whether the court below, as a matter of sound judicial discretion, should have exercised its jurisdiction. Certainly, the ordinary procedure for a Federal court is to decide Federal questions presented to it. There are certain exceptions which motivate Federal courts to decline jurisdiction to strike down State legislation, but these exceptions for the most part concern situations in which difficult constitutional questions might be avoided by an interpretation of State law by the State courts in the first instance, or where State regulatory orders involving clearly intrastate operations primarily of local concern are involved. *Propper* v. *Clark*, 337 U. S. 472 (1949); *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U. S. 341 (1951).

We submit that no exceptional circumstances exist in this case to deter a Federal court from exercising its power of decision. On the contrary, we contend that the case is one especially suited for determination in the Federal courts. Federal courts are uniquely equipped to decide national issues involving the construction of a *Federal* statute, and its application to interstate commerce. We re-

iterate that one issue in the case, indeed, the very issue which the court below regarded as decisive, concerned the interpretation of an Act of Congress vesting exclusive jurisdiction in a Federal regulatory agency. Such a claim is well within the province of Federal jurisdiction; it is a claim which the Federal courts should be constantly alert to evaluate and protect. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947); *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148 (1942); *Mayo* v. *United States*, 319 U. S. 441 (1943); *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605 (1926); *Hines* v. *Davidowitz*, 312 U. S. 52 (1941).

To hold otherwise would reflect overweening deference to State authority, especially in situations like the present where Federal regulation has gone unchallenged by the State of California for so long a period. The route in question has been subject, without attack, to exclusive Federal jurisdiction for almost thirteen years. To argue that the direction by the California Commission to file tariffs with it requires the Appellees to submit to the Commission's asserted jurisdiction and pursue only such remedies as the State law gives it—and these are niggardly, as we shall later point out—is to reduce the previously unchallenged authority of the Civil Aeronautics Board to an almost servile status. Under Appellants' contentions, Federal agencies such as the Civil Aeronautics Board would be required to go to the California Commission and California courts to vindicate their authority under Federal law over interstate air transportation whenever the State agency saw fit to challenge it. This amounts to much more than a "scrupulous regard . . . for the rightful independence of State governments which should at all times actuate the federal courts . . ." *Matthews* v. *Rodgers*, 284 U. S. 521, 525 (1932). This would be an abdication of responsibility by the Federal courts to pass upon the merits of a claim as to

invalidity of State legislation when the claim is based upon a conflict between such State legislation and Federal legislation.

Appellants argue, nevertheless, that Appellees are not entitled to Federal jurisdiction because of their failure to exhaust their State administrative remedies. This argument is advanced despite the absence of any indication by the Commission prior to the trial of the case that it did not consider its letters to Appellees as final administrative orders and determinations. We direct the court's attention to the specific language in the Commission's letters. The Commission's December 27, 1951 letter stated, in part:

> "In view of our interpretation of the Civil Aeronautics Act and the California Constitution we again instruct . . . United Air Lines, Inc. to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles."

Indeed, in the Statement as to Jurisdiction filed by Appellants in this court (p. 19), Appellants state that the Commission's letters "*were sent after considering the contentions of plaintiff United . . .*" In view of these repeated orders directing Appellants to file their tariffs with the Commission, there was nothing present in the situation to indicate that the Commission desired, or would permit, further administrative action before Appellants filed their tariffs with the Commission. Fairly read, these instructions from the Commission are not susceptible of the interpretation, now urged by the Commission, that they were in nowise compulsive but only a preliminary warning of an impending investigation of United's operations.

In this connection, Judge Orr said in the hearing on the motion for preliminary injunction (p. 98):

> "* * * I know if I were in the position of the air lines and got a letter like that, I would commence to do

something. I think I would better do something right away, either send the tariffs or tell them the circumstances.

"That seems to me like an order, a direct order, and what may be back of it, I think I am logical in saying that that does not convey to the party—no matter what their intention may have been, that letter does not convey that impression to the person receiving it. It means that the party receiving it, you better comply with this, you do this thing—that's it. And I received it, I would feel I better do that or take some other action to challenge their jurisdiction or do something else, because otherwise I might get into very serious trouble."

Judge Murphy said at the same hearing (p. 107):

"This last letter of December 27, 1951 is a very well-thought-out letter. It contains a very concise analysis of the position taken by the Public Utilities Commission, and then it ends up with a final paragraph:

"'In view of our interpretation of the Civil Aeronautics Act and the California Constitution, we again instruct you,——'

after giving an analysis in some detail of the factual situation and the predicates upon which you base your conclusions.

"If that isn't notice I can't conceive of any more formal notice. 'We again instruct you.'"

As Judge Orr and Judge Murphy observed in the hearing below, Appellees were faced with an explicit direction to file their tariffs with the Commission. Under the circumstances, the suit was not prematurely instituted. Cf. *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 29, 34 (1934).

Furthermore, we call attention to the fact that under California law a person is entitled to a review of rate action of the Public Utilities Commission only in the Supreme

Court of California and then only on questions of confiscation. Constitution of California, Article XII, Section 20. The severely limited nature of this review renders it inadequate for the type of controversy here involved and furnishes further support for the holding below that the controversy was a proper one for determination by a Federal court.

Appellants maintain that Appellees have failed to sustain the burden of showing threatened and probable action which would cause irreparable injury. However, this contention completely overlooks the facts. Appellants in the past have caused proceedings to be instituted in the California courts for the recovery of penalties against various air carriers, including Appellee United, in other cases wherein disputes have existed concerning the regulatory jurisdiction of the Commission (Finding of Fact 12). This course of action demonstrates a strong possibility of probable similar action with respect to the Catalina controversy. Furthermore, Appellants readily concede that they have asserted and continue to assert jurisdiction over the Catalina operations and that they intend to require Appellees to appear and defend in a proceeding before the Commission, which in all likelihood will be only an empty formality in view of the statement of the Commission's Chief Counsel that "he will again advise the Commission in the proceeding which will be instituted by the Commission that the Commission has and should assert jurisdiction over the operations here involved . . ." (Finding of Fact 11). Cf. *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24, 34 (1934). The District Court found as a fact that the cost of defending such proceeding will exceed $3,000, for which the Appellees will not be recompensed (Finding of Fact 11). In addition, Appellee United would have been subject to Federal penalties if it charged rates for the route involved different from

the rates already established in its tariffs on file with the Civil Aeronautics Board, 49 U. S. C. Sec. 622(d), and 49 U. S. C. Sec. 483. As the opinion of the court below stated:

> ". . . United thus found itself confronted with a sudden, belated and somewhat unexplained claim of jurisdiction. Being fearful of the consequences besetting a victim of conflicting jurisdictions, United filed this action."

Under the circumstances, Appellees maintain that the court below acted well within its discretion in awarding injunctive relief.

C. *This Court's Recent Decision in Public Service Commission of Utah v. Wycoff*

Appellants further rely upon the recent decision of this court in *Public Service Commission of Utah* v. *Wycoff*, 344 U. S. 237 (1952) to bolster their contention that the court below should not have exercised its jurisdiction over this case. *Wycoff* involved an action brought by a motor carrier in a Federal District Court seeking a purely abstract declaration that its carriage of goods between points within as well as without Utah was all interstate commerce. The carrier offered no evidence whatever to establish any past, pending or threatened action by the Public Service Commission of Utah touching its business in any respect. The trial court made a general finding that no such interference had been made or threatened. (344 U. S. at 240.)

In *Wycoff* this court held that the case could not be maintained as an injunctive action "because there is no proof of any threatened or probable act of the defendants which might cause the irreparable injury essential to equitable relief by injunction." (344 U. S. at p. 241.) Neither could the case be maintained as an action for declaratory judgment, because "the dispute has not matured to a point where

we can see what, if any, concrete controversy will develop." Nor was it apparent that the "proceeding would serve a useful purpose if at some future date the State [undertook] . . . regulation" of the carrier. (344 U. S. 245, 246.) However, *Wycoff* did not purport to limit the jurisdiction of the Federal courts to grant injunctive relief in cases where irreparable injury is established, or to lay down any tests for establishing irreparable injury different from those previously established by applicable case law. Neither did *Wycoff* hold, or remotely suggest, that whenever a State administrative body seeks to oust the jurisdiction of a Federal agency over a particular phase of commerce, a Federal court, even though its jurisdiction is properly invoked, must nevertheless stand meekly by until the State commission and State courts have had their say.

We submit that *Wycoff* is distinguishable from this case by at least the following factors:

1. In *Wycoff* there was no proof of any threatened or probable act which might cause irreparable injury. Here such proof was introduced in the record and the District Court specifically found as a fact that United's refusal

> "to heretofore comply with the directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. Apart from these risks, United is confronted with the necessity for incurring the expenditures incident to defending a proceeding certain to be instituted before the defendant Commission unless this Court resolves the controversy presented. No provisions exist under which United may recover its expenditures from the defendants, and these certain and possible expenditures may ultimately

be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United." (Finding of Fact 13)

2. In *Wycoff* the dispute had not matured to a point where the court could determine that any concrete controversy would develop. In this case there was a live and concrete controversy involving a precise question: whether United was obligated to file tariffs for the Catalina route with the Commission. The clash between the Commission on the one hand and the Civil Aeronautics Board and Appellees on the other hand is clear with respect to tariffs and control over the Catalina operations. There is no uncertainty as to the claims of either side, or as to the action which the Commission proposes. The merits of the problem here involved are not dependent upon a resolution of complicated facts within the particular competence of a regulatory body. Indeed, the facts are not disputed and the only question is a legal one: Does the Civil Aeronautics Act grant exclusive jurisdiction to the Civil Aeronautics Board to regulate rates charged by United over its Catalina route?

3. In *Wycoff* the declaratory decree sought would not have ended the controversy, and further proceedings would have been required when the Commission undertook to impose specific regulatory requirements. (344 U. S. at p. 246.) There would then be need for evidence concerning the facts then existing (344 U. S. at p. 247) and the evaluation of that evidence relating to operations unquestionably intrastate, which could best be determined in the first instance by an expert agency. Here the declaratory decree would finally settle the controversy. Furthermore, the question can be determined once and for all in the Federal court. In *Wycoff* there was no claim by the Federal regulatory agency concerned of any infringement of its jurisdiction. Here, the Civil Aeronautics Board intervened and became a party

to the suit, contending vigorously that Congress had vested it with exclusive jurisdiction over the subject route. There is nothing "nebulous or contingent" about the controversy in this case. The disagreement has taken on "fixed and final shape," the court "can see what legal issues it is deciding, what effect its decision will have on the adversaries and [that] some useful purpose [will] be achieved in deciding them." (344 U. S. at 244.)

We believe this case to be controlled by cases such as *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218; *Bethlehem Steel Corp.* v. *N. Y. State Labor Relations Board*, 330 U. S. 767; *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456; and *Cloverleaf Co.* v. *Patterson*, 315 U. S. 169. These cases were not even cited in, much less overruled by, the *Utah* case. In the *United Fuel* case, for example, the court specifically adverted to the fact that the State Commission there involved "has not yet done more than assert its jurisdiction over United's rates" (317 U. S. at p. 465). It nevertheless upheld the granting of injunctive relief by the Federal court, stating (317 U. S. at pp. 468 and 469):

> "Since these orders are invalid insofar as they impinge upon an authority which Congress has now vested solely in the Federal Power Commission, the decree below must stand unless we can fairly conclude that it was an abuse of discretion for the District Court to grant relief by way of injunction. It is perhaps unnecessary at this late date to repeat the admonition that the federal courts should be wary of interrupting the proceedings of state administrative tribunals by use of the extraordinary writ of injunction. But this, too, is a rule of equity and not to be applied in blind disregard of fact. And what are the commanding circumstances of the present case? First, and most important, the orders of the state Commission are on their face plainly invalid. No inquiry be-

yond the orders themselves and the undisputed facts which underlie them is necessary in order to discover that they are in conflict with the federal Act. If, therefore, United complies with these orders, it will be put to the expenditures incident to ascertaining the base for rate-fixing purposes—expenses which may ultimately be borne by the consuming public and which Congress, by conferring exclusive jurisdiction upon the federal regulatory agency, necessarily intended to avoid. If United does not comply with the orders, it runs the risk of incurring heavy fines and penalties or, at the least, in provoking needless, wasteful litigation. In either event, enforcement of the Commission's orders would work injury not assessable in money damages, not only to the appellee but to the public interest which Congress deemed it wise to safeguard by enacting the Natural Gas Act. In these circumstances, we cannot set aside the decree of the District Court as an improper exercise of its equitable jurisdiction. *Petroleum Exploration* v. *Public Service Comm.*, 304 U. S. 209, 58 S. Ct. 834, 82 L. Ed. 1294, was a very different case. There the regulation of intrastate rates alone was involved, no conflict between federal and state authorities was in issue, and the appeal to equity sought to anticipate the appropriate exhaustion of the administrative process."

For these reasons, we submit:

(1) that the three-judge court had jurisdiction under 28 U. S. C. 2281 because Appellants challenged the constitutionality of a State statute;

(2) that the three-judge court, having jurisdiction, was empowered to decide all issues in the case;

(3) that under applicable principles of law the court below acted properly in exercising its jurisdiction.

III. The Civil Aeronautics Act Vests Exclusive Jurisdiction Over the California-Catalina Route in the Civil Aeronautics Board.

As discussed above, the Civil Aeronautics Act defines "interstate air transportation" to include, among other things, "the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * in commerce between * * * places in the same State of the United States through the air space over any place outside thereof . . ." 49 U. S. C. 401(21)(a).

Appellants do not question the power of Congress to regulate interstate air transportation. Their argument is that the transportation here involved is not "interstate air transportation" within the meaning of the Civil Aeronautics Act. We submit that this argument cannot be supported.

It has long been established that transportation between places in the same State over the high seas or territorial waters outside the State constitutes foreign or interstate commerce subject to Federal control. *Lord* v. *Steamship Co.*, 102 U. S. 541 (1880). See also *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634 (1944) and *Pacific Coast Steam-Ship Co.* v. *Board of Railroad Commissioners*, 18 Fed. 10 (C. C. Cal., 1883).

The legislative history of the pertinent sections of the Civil Aeronautics Act clearly establishes that Congress intended to regulate air transportation between places in the same State when that transportation involves the passage of aircraft over waters outside the State. This is made abundantly clear by the fact that one of the first bills introduced for the regulation of interstate air commerce (S. 3027, 74th Cong., 1st Sess., 1935), defined interstate commerce as "commerce * * * between places in the same state through another state." Upon the request of Senator

Wheeler, Mr. Joseph Eastman, Federal Co-ordinator of Transportation, suggested corrections in the bill. In a letter on July 31, 1935, Mr. Eastman suggested that "after the word 'through' in line 18 there be substituted for the words 'another state' the words 'the air space over any places outside thereof'. The latter change would include as interstate commerce transportation between points in the same state over a foreign country or the high seas, as well as over another state." Hearing before the Subcommittee on Interstate Commerce, United States Senate, 74th Cong., 1st Sess., S. 3027, page 68. Mr. Eastman's suggested change appears in all bills after the date of his letter, and is now contained in Sections 1(20) and 1(21) of the Act, 49 U. S. C. 401(20), 401(21).

Moreover, it is equally apparent that Congress sought to regulate air transportation of the type here involved in a complete and comprehensive manner. For example, the Civil Aeronautics Act provides that tariffs for interstate air transportation must be filed with the Board, 49 U. S. C. 483, that rates and charges contained therein may be fixed by the Board, 49 U. S. C. 642(d), and that tariffs filed and rates fixed must be observed or heavy penalties incurred, 49 U. S. C. 622(d). In addition, the Act empowers the Board to prescribe all practices in connection with such transportation, 49 U. S. C. 484, 491, 642, and further provides that operations may be suspended or terminated only by leave of the Board, 49 U. S. C. 481(k). Other examples of the comprehensive manner in which the Act regulates air transportation are found in provisions authorizing the Board to determine whether a particular carrier is rendering adequate interstate service, 49 U. S. C. 484, 642, in provisions directing carriers to file all contracts affecting interstate air transportation with the Board for approval or disapproval, 49 U. S. C. 488, 492, in provisions subjecting to Board control all intercorporate relationships, and in

provisions authorizing the Board to prescribe standards under which accounts and records must be maintained, 49 U. S. C. 487.

Mr. Justice Jackson's concurring opinion in *Northwest Airlines* v. *Minnesota*, 322 U. S. 292 (1944) at 303, well describes the extent of Federal regulation of air transportation:

> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government."

There can thus be no doubt that the Civil Aeronautics Act imposes complete and comprehensive regulation upon all phases of interstate air transportation. In clashes of *State* v. *Federal* regulatory control of this nature, this court enunciated the following test:

> "The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the Federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, at 236 (1947).

Applying that test to these circumstances, California's claim to jurisdiction over the California-Catalina route must fall. "There is no room in our scheme of government for the assertion of State power in hostility to the author-

ized exercise of Federal power." *Simpson* v. *Shepard*, 230 U. S. 352, at 399 (1913). The contention of Appellants that California may regulate this route must give way by virtue of the Supremacy clause. U. S. Const. Art. VI, Cl. 2.

IV. The Air Space Through Which Appellees' Flights Traverse on the California-Catalina Route Are Over Waters Outside California, and Accordingly Constitute Interstate Air Transportation.

It is undisputed that Santa Catalina Island is separated from the mainland of California by the San Pedro Channel, and that the distance between the shorelines of the Island and the mainland of California is approximately 30 miles. Forty years ago, the Supreme Court of California found as a fact that surface transportation between the Island and the mainland requires "travel for upwards of 20 miles upon the high seas outside of the territorial jurisdiction of . . . [California]." *Wilmington Transportation Co.* v. *Railroad Commission of California*, 166 Cal. 741, 137 P. 1153 (1913). This decision was affirmed by the Supreme Court of the United States in *Wilmington Transportation Co.* v. *Railroad Commission of California*, 236 U. S. 151, 152 (1915). In its opinion in the *Wilmington* case, this court expressly stated that vessels traveling between the Island and the mainland "must traverse the high seas for upwards of 20 miles." Appellees contend that these decisions conclusively establish that the waters separating Santa Catalina Island from the California mainland are not inland waters of California.

We deem it significant that Appellants have not even commented on these statements in the *Wilmington* decisions in their Statement as to Jurisdiction. In view of these decisions, we respectfully submit that the route involved in this case unquestionably traverses "between points

within the same State * * * but through the air space over any place outside thereof" within the meaning of the Civil Aeronautics Act's definition of interstate air transportation.

* * * * *

In Appellant's Statement as to Jurisdiction, the contention is made that, if the direction issued by the Commission to United is to be viewed as an enforceable order under the California Public Utilities Code, the court below should not have enjoined the "order" in view of the Johnson Act, 28 U. S. C. A. 1342. The short answer to this contention is found in the express language of the Johnson Act itself, which provides that:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate making body of a State political subdivision, where:
>
> "(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal constitution; and,
>
> "(2) the order does not interfere with interstate commerce; and,
>
> "(3) the order has been made after reasonable notice and hearing; and,
>
> "(4) a plain, speedy and efficient remedy may be had in the courts of such State."

The Johnson Act is clearly inapplicable: (a) because jurisdiction is not based solely on diversity of citizenship, or repugnance of the "order" to the Federal Constitution, (b) because the "order" *does* interfere with interstate commerce, (c) because the "order" was not made after reasonable notice and hearing, and (d) because a plain, speedy and efficient remedy is not available in the courts of the State of California.

WHEREFORE, Appellees move that the within appeal be dismissed or that the judgment and decree of the District Court be affirmed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1953.

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT; JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER, and PETER E. MITCHELL, Members of and Collectively Constituting the Public Utilities Commission of the State of California; EVERETT C. McKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, and J. THOMASON PHELPS, Legal Advisers of the Public Utilities Commission of the State of California,

Appellants,

vs.

UNITED AIR LINES, INC., a corporation; CATALINA AIR TRANSPORT, a corporation, and the CIVIL AERONAUTICS BOARD,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF APPELLEES, UNITED AIR LINES, INC. AND CATALINA AIR TRANSPORT.

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INDEX.

	PAGE
Opinion Below	1
Jurisdiction	21
Questions Presented	2
Statutes Involved	3
Statement	3
Summary of Argument	13
Argument	15
I. The case below was properly heard and decided by a three-judge District Court, and this Court therefore has jurisdiction by direct appeal	15
II. The District Court properly awarded injunctive and declaratory relief	22
A. The Record Supports the Finding of Threatened Irreparable Injury by the District Court and Justifies the Award of Injunctive Relief; the District Court Properly Granted Declaratory Relief	23
1. Appellants' contentions concerning proof of threatened irreparable injury really seek to overrule the finding of fact of the District Court on this issue. Therefore, the problem is determining whether the District Court's findings are supported by the record	23
2. Appellants also attack the award of declaratory relief by the District Court. Appellants confuse the issue by implying that threatened irreparable injury is not only a prerequisite to the issuance of injunctive relief, but is also needed to justify a declaration of the rights of the parties. This is simply not so	30

B. United Was Not Required to Take Further Steps Before the Commission Nor to Apply to the State Courts for Relief Before Instituting This Action in the Federal Courts... 33

Cases Relied on by Appellants..... 39

The Reasons Underlying the Doctrine of Exhaustion of Administrative Remedies Are Absent Here..... 41

The Remedy Available in the California Courts Is Inadequate..... 43

The Recent Alabama and Utah Decisions 45

The Johnson Act..... 49

C. The Decision Below Is Consistent With the Preservation of a Proper Federal-State Relationship 50

III. Transportation between Catalina Island and the mainland of California goes through the air space over a place outside the State of California and hence is "Interstate Air Transportation" within the meaning of the Civil Aeronautics Act 55

A. The Area Between Catalina Island and the Mainland of California, Except That Portion Within the Three-Mile Marginal Belts Along the Mainland Coast and Around the Island, Is a Place Outside the Boundaries of California 55

B. The Applicable Rule of International Law. 57

C. The California Coast Line..... 59

D. California Cannot Act for the United States in Extending National Boundaries in the Marginal Seas..... 59

E. Relevant Expressions of the Position of the United States by the Executive Department 60

F. Recognition of the Position of the United States by Federal and California Courts... 61

G. Neither the Approval of California's Constitution Upon Its Joining the Union Nor Passage of the Submerged Lands Act Indicated a Change in the Position of the United States 65

H. The View Now Urged by California Is Inconsistent With the Traditional Advocacy of Freedom of the Seas by the United States and Would Not Contribute to the Security of the United States..... 66

IV. By the provisions of the Civil Aeronautics Act and the Board's action thereunder the United States has assumed exclusive jurisdiction over the appellees' operations between the mainland of California and Santa Catalina Island..... 67

A. The Plain Meaning of the Statute, Its Legislative History and Obvious Purposes Bring This Transportation Under the Exclusive Control of the Civil Aeronautics Board..... 67

B. Appellants' Contention That Congress Did Not Intended to Regulate the Subject Transportation, Even if Not Intrastate, Is Insupportable 71

Conclusion..... 75

Citations.

Cases.

Adams Express v. Croninge, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314 68

Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 241 (1937) 30

Alabama Public Service Commission v. Southern Railway Co., 341 U. S. 341 (1951) 45, 46, 52

Anglo-Norwegian Fisheries Case, I. C. J. Reports 1951, p. 116 ..... 57, 58, 59, 61

Arkansas R. R. Commission v. Chicago Rock Island & Pac. R. R. Co., 274 U. S. 597, 603 (1927) 73

Barton v. Belt Line Ry., 268 U. S. 413 (1925) 43

B. F. Goodrich v. FTC, C. A. D. C. July 16, 1953 (CCH Trade Reg. Reporter 1953, para. 67-533) 25

Burford v. Sun Oil Co., 319 U. S. 315, 332 (1943) 51

California Water Service Co. v. Redding, 304 U. S. 252, 255-256 (1938) 18, 19

Case v. Bowles, 327 U. S. 92 (1946) 19

Catalina Air, Service to Santa Catalina Island, 2 C. A. B. 798 5

City Bank Co. v. Schnader, 291 U. S. 24, 34 (1934) 30, 37, 42

City of Springfield v. United States, 99 F. 2d 860 (1938) 306 U. S. 650, 1939 19

Cloverleaf Co. v. Patterson, 315 U. S. 148 (1942) 38, 52

Columbia System v. U. S., 316 U. S. 407, 422-425 (1942) 25

Davies Warehouse Co. v. Bowles, 321 U. S. 144 (1944) 73

Endicott Johnson Corp. v. Perkins, 317 U. S. 501 (1943) 41

Euclid v. Ambler Realty Co., 272 U. S. 365 (1926).... 31
Ex parte Bransford, 310 U. S. 354 (1940)..... 19
Ex parte Collins, 277 U. S. 565 (1928)..... 15
Ex parte Keil, 85 Calif. 309 (1890)..... 64
Ex parte Public Bank of New York, 278 U. S. 101 (1928) 16
Ex parte Young, 209 U. S. 123 (1908)..... 17
Farmers Gin Co. v. Hayes, 54 F. Supp. 43 (D. C. W. D., Oklahoma, 1943)..... 19
Federal Power Commission v. Arkansas Power and Light Company, 330 U. S. 802 (1947)..... 40
FPC v. Panhandle Eastern Pipe Line Co., 337 U. S. 498 (1949)..... 38, 39
First Iowa Hydro-Electric Cooperative v. F. P. C., 328 U. S. 152 (1946)..... 53
Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285 (1922)..... 42
Gully v. Interstate Natural Gas Co., 292 U. S. 16, 19 (1934) 22
Gully v. Interstate Natural Gas Co., 82 F. 2d 145 (C. A. 5, 1936), cert. den. 298 U. S. 688 (1936)..... 30, 42
Hines v. Davidowitz, 312 U. S. 52 (1941)..... 53
Holabird v. Railroad Commission, 171 Cal. 691 (1916) 44, 45
In Re Marincovich, 45 Cal. App. 474 (1920)..... 62, 65
Jones v. United States, 137 U. S. 202 (1890)..... 59
Keller v. Potomac Electric Co., 261 U. S. 428, 440-441 (1923) 43
Lawson v. Suwannee Fruit and S. C. Co., 336 U. S. 198, 201 (1949)..... 68
Lichton v. Eastern Air Lines, 189 F. 2d 939, 941 (1951) 68

Local 36 of International Fishermen, et al. v. United States, 177 F. 2d 320 (C. A. 9, 1949) 68

Lord v. Steamship Co., 102 U. S. 541 (1880) 68

Macauley v. Waterman S. S. Corp., 327 U. S. 540 (1946) 40

Mack v. Eastern Air Lines, Inc., 87 F. Supp. 113 68

Manaka v. Monterey Sardine Industries, 41 F. Supp. 531 (D. C. N. D. Cal. 1940) 68

Manchester v. Massachusetts, 139 U. S. 240 (1891) ..59, 60

Matthews v. Rodgers, 284 U. S. 521, 525 (1932) 53

Mayo v. United States, 319 U. S. 441 (1943) 52

Moore v. Fidelity & Deposit Co., 272 U. S. 317 (1926) 19

Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938) 32, 39

Napier v. Atlantic Coast Line R. Co., 272 U. S. 605 (1926) 53

Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249 (1933) 30

New York Central Railway Co. v. New York and Pa. Co., 271 U. S. 124 (1926) 37

North Carolina v. United States, 325 U. S. 507, 510 (1945) 72

Oklahoma Gas Co. v. Packing Co., 292 U. S. 386, 392 (1934) 16, 22

Oklahoma Operating Co. v. Love, 252 U. S. 331 (1920) 17

Palmer v. Massachusetts, 308 U. S. 79 (1939) 67, 72

Paulos v. New Hampshire, 345 U. S. 395 (1952) 32

Penn. Greyhound Lines v. Board of P. U. Comm'rs., 107 F. Supp. 521 (D. C. New Jersey, 1952) 19

Pennsylvania v. West Virginia, 262 U. S. 553, 592 (1923) 30

People v. Stralla, 96 P. 2d 841 (1939) 62, 63

People v. United Air Lines, 258 P. 2d 66 (1953)..... 7

Petroleum Exploration, Inc. v. Public Service Commission of Kentucky, 304 U. S. 209 (1937)..... 32

Pierce v. Society of Sisters, 268 U. S. 510 (1925) ... 31

Prendergast v. New York Telephone Co., 262 U. S. 43 (1923) 43

Producers Transportation Co. v. Railroad Commission, 176 Cal. 499 (1917)..... 44

Public Service Commission of Missouri v. Brashear Freight Lines, Inc., 312 U. S. 621, 625 (1941)..... 18

Public Service Commission of Utah v. Wycoff Co., 344 U. S. 237 (1952).....31, 45, 47, 48, 49, 52

Public Utilities Commission of Ohio v. United Fuel Gas Co. et al., 317 U. S. 456 (1943)..19, 22, 29, 37, 45, 70

Query v. United States, 316 U. S. 486 (1942)..... 20

Railroad & Warehouse Commission of Minnesota v. Duluth St. R. Co., 273 U. S. 625, 627 (1927)..... 43

Railroad Commission v. Pacific Gas & Electric Co., 302 U. S. 388, 391 (1938)..... 18

Railroad Commission v. Pullman Co., 312 U. S. 496 (1941) 51

Rice v. Santa Fe Elevator Corporation, 331 U. S. 218 (1947).....,37, 38, 52, 71

Rochester Telephone Corporation v. United States, 307 U. S. 125 (1939).....40, 41

Rorick v. Commissioners, 307 U. S. 208 (1939)..... 15

Simpson v. Shepard, 230 U. S. 352 at 399 (1913)..... 73

Stainback v. Mo Hock Ke Loh Po, 336 U. S. 368, 381 (1949)..... 22

Sterling v. Constantin, 287 U. S. 378, 393-394 (1932)... 17

Suttori v. Peckham, 48 Cal. App. 88 (1920)..... 62

Texas v. Florida, 306 U. S. 398, 411-412 (1939)..... 30

Tobin v. Banks and Rumbaugh, 201 F. 2d 223 (U. S. C. A. 5, 1953) 41
United Air Lines, Catalina Air Transport, 6 C. A. B. 1041 5
United States v. Belmont, 301 U. S. 324 (1937) 59
United States v. California, No. 6, Original 55, 56
United States v. California, 332 U. S. 19 (1947) 56, 59, 66
United States v. Carrillo (D. C. S. D. Cal., 1935) 13 F. Supp. 121 ..... 59, 62
United States v. Louisiana, 339 U. S. 699 (1950) 59
United States v. Texas, 339 U. S. 707 (1950) 59
United States v. Yellow Cab Company, 332 U. S. 218, 233 (1946) 71
Western Union Telegraph Co. v. Andrews, 216 U. S. 165 (1910) 17
Wilmington Catalina Air, Grandfather Certificate, 1 C. A. A. 431 4
Wilmington Transp. Company v. California R. R. Commission, 236 U. S. 151, 152 (1915) 61, 62
Winchester v. Winchester Water Works, 251 U. S. 192 (1920) 19
Yonkers v. United States, 320 U. S. 685, 691 (1944) 72

Statutes.

California Constitution, Art. XXI 5

California Government Code:
Sec. 170 35
Sec. 171 35

California Public Utilities Code:
Sec. 308 ..... 26, 27
Sec. 311 ..... 26, 27
Sec. 703 54
Sec. 1756 43
Sec. 2101 28
Sec. 2104 16
Sec. 2105 17
Sec. 2107 ..... 2, 8, 16, 26, 43
Sec. 2108 16
Sec. 2113 ..... 24, 26

Title 49, Civil Aeronautics Act:
Sec. 303(a)(10) 69
Sec. 303(b)(8) 69
Sec. 401 (10) 7
Sec. 401 (16) 69
Sec. 401 (20) 7
Sec. 401 (20)(a) 4
Sec. 401 (21) 7, 67
Sec. 401 (21)(a) 4
Sec. 401 (32) 74
Sec. 404 (a) 68
Sec. 448 (a) 68
Sec. 452 69
Sec. 481 (a)(k) 70
Sec. 481 (c) 54
Sec. 483 ..... 25, 70
Sec. 484 70

Sec. 487 70
Sec. 488 70
Sec. 492 70
Sec. 499 70
Sec. 622 (a) 68
Sec. 622 (d) 25
Sec. 642 70
Sec. 642 (d) 70

United States Constitution Art. VI, Cl. 2 71

U. S. Code, Title 15, Sec. 717 21

U. S. Code, Title 28, Judicial Code:
Sec. 1253 ..... 2, 3, 22
Sec. 1331 51
Sec. 1337 51
Sec. 1342 49
Sec. 2101 (b) 2
Sec. 2201 31
Sec. 2281 ..... 2, 9, 12, 15
Sec. 2284 ..... 9, 12, 15

Miscellaneous.

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Letter, Secretary of State to Attorney General dated Nov. 13, 1951 56

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1 Moore, Digest of International Law, pp. 698, 702, 721 .....57, 60, 61

Note, Need for Injunctive Relief As Prerequisite for Granting Declaratory Judgment, 56 Yale L. J. 139 (Borchard) 1946 31

Note, Administrative Action As a Prerequisite of Judicial Review, 35 Col. L. Rev. 230, 234 (1935) 42

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S. 3027, 74th Cong. 1st Sess. 1935 68

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BRIEF OF APPELLEES, UNITED AIR LINES, INC. AND CATALINA AIR TRANSPORT.

OPINION BELOW.

The opinion of the three-judge District Court (R. 46-50) is reported at 109 F. Supp. 13.

JURISDICTION.

The judgment of the three-judge District Court was entered on January 28, 1953. (R. 65-67.) A motion for a

new trial, which was filed on February 6, 1953 (R. 68), was denied on February 20, 1953. (R. 104.) The petition for appeal was filed on March 27, 1953 (R. 105), and an order allowing the appeal was entered on the same day. (R. 106.) The appeal was filed in this Court on May 22, 1953, and this Court entered an order on June 15, 1953 postponing further consideration of its jurisdiction and of the motion to dismiss or affirm until the hearing on the merits. (R. 265.)

The jurisdiction of this Court rests on 28 U. S. C. 1253, and 2101 (b).

QUESTIONS PRESENTED.

The three-judge District Court granted injunctive and declaratory relief against attempts by the Appellants to assume regulatory control over air operations conducted by Appellee United Air Lines, Inc. between the mainland of California and Santa Catalina Island after finding that such operations are subject to exclusive regulation by the Appellee, Civil Aeronautics Board. Appellants' statement of the questions presented in this appeal is misleading because it contains no reference to Appellees' attack on the constitutionality of Section 2107 of the California Public Utilities Code which was the reason why the case was heard below by a three-judge District Court. Moreover, Appellants' statement of the questions presented is incomplete because in large degree it ignores the merits of the controversy. Appellees submit that a more accurate statement of the questions presented is as follows:

1. Whether the case was properly heard by a three-judge District Court under 28 U. S. C. 2281 to consider Appellees' contention that enforcement of Section 2107 of the California Public Utilities Code against them would violate the Federal Constitution, and consequently whether the judgment below is di-

rectly appealable to this Court under 28 U. S. C. 1253.

2. Whether the record supports the findings of fact of the three-judge District Court that the air carrier Appellees established a threat of irreparable injury justifying injunctive relief and whether the District Court properly awarded declaratory relief.

3. Whether transportation by aircraft between the mainland of California and Santa Catalina Island goes through air space over a place outside the State of California and hence is "interstate air transportation" within the meaning of the Civil Aeronautics Act.

4. Whether, by the provisions of the Civil Aeronautics Act and the Board's action thereunder, the United States has assumed exclusive jurisdiction to regulate Appellees' operations between the mainland of California and Santa Catalina Island.

STATUTES INVOLVED.

The provisions of the Civil Aeronautics Act, the California Public Utilities Code, and the California Constitution relevant to this case are set forth as Appendix A to Appellants' Brief, and are therefore not reprinted, but are cited, in this Brief. Certain additional statutory provisions are quoted in the text where appropriate.

STATEMENT.

Santa Catalina Island, part of the State of California, is located in the Pacific Ocean approximately 30 miles from the mainland of California. (R. 58.) In 1939, Wilmington-Catalina Airlines, Ltd., was awarded a Certificate of Public Convenience and Necessity by the Civil Aeronautics Authority (now known as the Civil Aeronautics Board) authorizing the air transportation of persons and property between Wilmington, on the mainland

of California, and Avalon on Santa Catalina Island. (R. 35, R. 58.)

The issuance of this Certificate to Wilmington-Catalina Airlines, Ltd. was based upon findings that the boundaries of California did not extend beyond three miles from the shoreline of the mainland, and beyond three miles from the shoreline of Santa Catalina Island. (R. 58.) Because aircraft flying between Wilmington and Avalon were required to fly over approximately 24 miles of water not within the boundaries of the State of California, the Board concluded that common carrier transportation by aircraft between these points constituted interstate air transportation as defined by the Civil Aeronautics Act. *Wilmington-Catalina Air, Grandfather Certificate*, 1 C. A. A. 431. (R. 58.)

Subsection 20 (a) of Sec. 401 of the Civil Aeronautics Act defines "interstate air commerce" subject to federal regulation as including, in part, "the carriage by aircraft of persons or property for compensation or hire * * * between places in the same State of the United States through the air space *over any place outside thereof.*" (49 U. S. C. 401, Sec. 20(a)). (Emphasis added.)

Subsection 21(a) of Sec. 401 of the Civil Aeronautics Act defines "interstate air transportation" subject to federal regulation as including, in part, "the carriage by aircraft of persons or property as a common carrier for compensation or hire * * * between places in the same State of the United States through the air space *over any place outside thereof.*" (49 U. S. C. 401, Sec. 21(a)). (Emphasis added.)

In 1941, the Civil Aeronautics Board extended the route of Wilmington-Catalina Airlines, Ltd. to Los Angeles, authorizing the carrier to conduct operations between Los Angeles and Avalon via the intermediate point of Wilming-

ton-Long Beach, California. (R. 58.) At the same time, the Board reissued the Certificate in the name of the Appellee, Catalina Air Transport. *Catalina Air, Service to Santa Catalina Island*, 2 C. A. B. 798. This amended certificate is still in full force and effect. (R. 58.)

In 1942, after the carrier's equipment was requisitioned by the United States for military purposes, the Board authorized a temporary suspension of operations which continued for the duration of World War II. See 6 C. A. B. 1041, 1043 (1946). (R. 59.) After the war, the Civil Aeronautics Board approved an operating contract between Appellees, United Air Lines and Catalina Air Transport, dated March 7, 1946, whereby United agreed to perform and discharge all of the obligations of Catalina Air Transport under its Certificate of Public Convenience and Necessity. *United Air Lines, Catalina Air Transport*, 6 C. A. B. 1041. (R. 59.) Various supplemental agreements relating to the rates and fares for the transportation provided by United were subsequently approved by the Civil Aeronautics Board, together with other agreements relating to miscellaneous details of the Catalina operation. (R. 59.) Operations have been continuously conducted by United over such route from June 3, 1946 to date. (R. 59.) Tariffs for the carriage of persons and property have been, and are maintained on file by United with the Civil Aeronautics Board. (R. 59-60.)

Since 1939, therefore, air transportation between California and Santa Catalina Island has been conducted by Appellee carriers under the exclusive regulatory control and jurisdiction of the Civil Aeronautics Board. Until 1951, the jurisdiction of the Civil Aeronautics Board remained unchallenged. Tariffs for the operations were never filed with the California Commission, which evinced no interest whatever in the route until 1951—more than 12

years after the federal agency had assumed full regulatory control.

Without explanation, the Commission suddenly developed an interest in the route in 1951. On August 6, 1951, the Director of Transportation of the California Public Utilities Commission sent a letter concerning the Catalina operations to Appellee United, stating that a review of the Commission's files "fails to indicate that the United Air Lines have a tariff on file with this Commission which sets forth the fares, rules and charges applicable to the aforementioned California intrastate traffic." This letter stated: "It is requested that you inform this office as to what action United Air Lines contemplates taking in this matter." (R. 37-38.)

United replied to the Commission on September 10, 1951, stating that its tariffs for this route were on file with the Civil Aeronautics Board, saying: "Inasmuch as the Public Utilities Commission of the State of California does not have jurisdiction over the regulation of this service, we have not filed a tariff with your Commission." (R. 38-39.)

On September 20, 1951, the Secretary of the Commission sent another letter to United. This letter stated:

> *"This is to inform you that this Commission does have jurisdiction over the service in question, it being intrastate, and the Supreme Court of this State has held that such service is subject to the jurisdiction of this Commission. Therefore, you are instructed to file with this Commission the tariffs covering the service in question."* (Emphasis added.) (R. 39-40.)

On October 11, 1951, United wrote to the Commission stating that United's Law Department was reviewing the question. (R. 40.) On November 6, 1951, the Commission sent another letter to United requesting that United inform the Commission of its position. (R. 41.) On November 30, 1951, United sent another letter to the Commission

stating that the Commission would hear from United's counsel within a few days, and on December 5, 1951 United's counsel sent a letter to Mr. Wilson E. Cline, the Assistant Counsel of the Commission. In this letter of December 5, counsel for United, after stating that the letter was addressed to Mr. Cline because it concerned a question of law, went on to point out that the Catalina route was not subject to the jurisdiction of the State Commission because

> "all but a small portion of the route traverses the high seas, an area which lies without the boundaries of the State of California (California Constitution Article XXI). Under such circumstances, the express language of the Civil Aeronautics Act establishes the fact of exclusive federal occupancy of the field of regulation (49 U. S. C. 401 (10), (20, and 21)). Ipso facto, this precludes the exercise of control by the State." (R. 43.)

On December 27, 1951, the California Commission responded through its Secretary, R. J. Pajalich, who wrote that the letter of December 5 from United's counsel to Mr. Cline "has been referred to this office for reply." The Commission's reply, set out in full at pages 44 to 46 of the Record, concluded as follows:

> "In view of our interpretation of the Civil Aeronautics Act and the California Constitution *we again instruct your client United Air Lines, Inc. to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles.*" (Emphasis added.) (R. 46.)

Because of other litigation which was then (and still is) pending[1] between the California Public Utilities Commission and United concerning United's liability for penalties for an alleged tariff violation, United had reason to be

1. *People of the State of California* v. *United Air Lines, Inc.*, California District Court of Appeal, First Appellate District, 1 Civil No. 15,549, opinion filed June 10, 1953, 258 P. 2d 66; order granting hearing by Supreme Court of California filed August 6, 1953, Case No. S. F. 18900.

aware of Sec. 2107 of the California Public Utilities Code, which provides:

> "Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any *order, decision, decree, rule, direction, demand, or requirement of the Commission*, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than Five Hundred Dollars ($500) nor more than Two Thousand Dollars ($2,000) for each offense." (Emphasis added.) (Appellants' Brief, Appendix A, p. xii.)

The Public Utilities Commission had in the past asserted that the penalties prescribed by Sec. 2107 were applicable to air carriers and had, as stated above, actually instituted proceedings in the California courts to recover such penalties against various air carriers, including Appellee United, in other disputes concerning the regulatory jurisdiction of the Commission. (Finding of Fact 12, R. 60-61.)

Faced with conflicting claims of jurisdiction over United's Catalina route by State and Federal agencies and confronted with the prospect of reparation suits and incurring penalties up to $2,000 for each day that its tariffs were not on file with the California Commission, plus the risk of jeopardizing its 1946 contract with Catalina Air Transport which had been approved by the Civil Aeronautics Board, United brought this action in the United States District Court for the Northern District of California, with Catalina Air Transport joining as a party plaintiff.

Appellees' complaint alleged, *inter alia*, that the California Commission was asserting: that the Catalina operations were "entirely under the control and regulation" of the Commission; that United, in failing to file its tariffs pursuant to the Commission's directions, had violated Sec. 2107 of the California Public Utilities Code; that United

had thereby become liable for penalties up to the sum of $2,000 per day for each day of violation. (R. 4-5.)

In addition, the complaint alleged that Appellees had no "plain, speedy and efficient remedy in the courts of the State of California," that there were substantial risks of other penalties, including criminal penalties, and that the Commission claimed that the State statute authorized the bringing of "numerous suits for so-called reparations in which said defendants claim that all rates or charges collected by plaintiff United Air Lines, Inc., may be recovered together with interest and, if the violation was wilful, with exemplary damages in undefined amounts * * *." (R. 5-6.)

The complaint further alleged that the defendants' claims were unfounded because Congress, by passing the Civil Aeronautics Act, had pre-empted the entire field of regulation of the route, that the carriers were therefore not subject to the provisions of the Public Utilities Act of California imposing penalties, and that if those penalties were in any way applicable they were "excessive, unreasonable, arbitrary and oppressive, and impose an unreasonable burden on commerce, and amount to a taking of the property without due process of law, and constitute deprivation of the equal protection of law—all in violation of the Fourteenth Amendment to the Constitution of the United States." (R. 5.)

Appellees requested a declaration of rights and an injunction restraining the California authorities "from instituting any action or taking any proceeding for the enforcement or collection of any of the penalties claimed by the defendants." (R. 8.)

Because of the constitutional claim presented by the complaint, a three-judge District Court was convened, pursuant to 28 U. S. C. 2281, and 2284. On August 1, 1952, the

Civil Aeronautics Board moved for leave to intervene as a party plaintiff (R. 13-14), and the Court permitted such intervention on August 12. (R. 21.) The Board's complaint in intervention alleged that the Civil Aeronautics Act had vested the Board with exclusive jurisdiction over the Catalina operations, and that attempts by the California Commission to assume regulatory control over the Catalina operations "constitute an unlawful interference with interstate commerce and unlawfully interfere with the jurisdiction and functions of the Civil Aeronautics Board." (R. 25.)

Before the trial the parties entered into an agreed statement of facts. (R. 34-37.) In this agreed statement of facts, the correspondence between the Commission and Appellee United was incorporated as Exhibits A-1 through 10. (R. 37-46.) (Appellants' Brief, Appendix B.)

The extent to which an action for penalties was threatened by the Commission prior to the time of trial was in dispute, Counsel for Appellees testifying that the threat of such an action had been made, Chief Counsel for the Commission testifying that he had no recollection of making the statement attributed to him. (R. 169-170, 201.)

During the trial of the case, however, Counsel for the Commission stated without qualification that penalties would be sought if after proceedings before the Commission to determine its jurisdiction United failed to comply with such order as might be issued. (R. 179, 197.) Chief Counsel for the Commission further testified that the Commission's prior written assertions of jurisdiction and directives to United had been entered upon his advice and recommendation (R. 199), and that he would again advise the Commission that it had jurisdiction if the Commission conducted a formal proceeding into the question of the Catalina operations. (R. 200.)

After hearing this testimony, other evidence, and the arguments of counsel, the District Court unanimously found that:

> "13. The refusal of the plaintiff United to heretofore comply with the directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. Apart from these risks, United is confronted with the necessity for incurring the expenditures incident to defending a proceeding certain to be instituted before the defendant Commission unless this Court resolves the controversy presented. No provisions exist under which United may recover its expenditures from the defendants, and these certain and possible expenditures may ultimately be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United." (Finding of Fact 13; R. 61.)

The Court also concluded that:

> "4. The proceeding before the defendant Public Utilities Commission which the defendants, unless precluded by action of this Court, intend to institute against the plaintiff air carriers will subject said air carriers, and possibly the public, to irreparable injury if the said Commission has no jurisdiction in the premises, and would constitute a burden on interstate commerce and an interference with the jurisdiction of the Civil Aeronautics Board. These factors, coupled with the risks and expenditures to which the plaintiffs may be subjected as a result of possible penalty actions, and the actual controversy which exists between the parties, are such as to entitle both the plaintiffs and the intervenor to declaratory relief, and injunctive relief against actions which the defendants might otherwise institute concerning a sub-

> ject matter over which the defendant Commission and the State of California are hereinafter found to lack jurisdiction. Plaintiffs have no plain, speedy and efficient remedy in the Courts of the State of California, or otherwise, than by this action. Further, since the matter in issue concerns the reach of a Federal statute which conflicts with the claims of the defendants regarding state law, this Court should decide the issues tendered irrespective of the existence or adequacy of any state Court remedies." (Conclusion of Law 4; R. 63.)

Unanimous in its opinion, the District Court pointed out that a three-judge Court was properly convened "because the complaint sought to restrain enforcement of a state statute, inter alia, upon the alleged ground of its unconstitutionality." (R. 48.) The Court concluded that:

> "A substantial question would have been presented as to the constitutionality of these penalty provisions, if reached, and the appointment of a three-judge Court pursuant to 28 U. S. C. 2281 and 2284 was appropriate and required for the purpose of enabling the Court to resolve all issues presented by the air carrier plaintiffs." (R. 62.)

The Court pointed out that after it had assembled and heard the case, it was found unnecessary to reach or decide "the issue tendered, that the State statute is unconstitutional." (R. 48.) However, finding other adequate bases of federal jurisdiction and other federal issues presented, the Court decided that since it had properly acquired jurisdiction, it had power to consider and dispose of all questions involved in this suit. (R. 48-49.) Accordingly, the Court entered its unanimous decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the Catalina operation and enjoining the State authorities from interfering in any manner with the Board's jurisdiction or from in any way controlling or regulating the Catalina route. (R. 65-67.)

Appellants filed a motion for a new trial on February 6, 1953. (R. 68.) The motion was heard February 19, 1953 (R. 237-262), and was denied on February 20, 1953. (R. 104.) The case was brought to this Court by direct appeal.

SUMMARY OF ARGUMENT.

Appellants presented substantial constitutional questions concerning the validity of a State statute under the Fourteenth Amendment and the Commerce Clause of the Federal Constitution to a three-judge District Court. The court determined that the constitutional questions were substantial, but found it unnecessary to reach these questions because of the existence of other federal grounds of decision. Because the jurisdiction of a three-judge court existing by reason of the presence of a substantial constitutional question extends to every question of law involved, the court below properly retained jurisdiction and decided the case on its merits.

The District Court properly awarded injunctive and declaratory relief. The District Court's findings of threatened irreparable injury supporting injunctive relief are clearly supported by the record. Declaratory relief, which does not even depend upon proof of threatened irreparable injury, was certainly proper in this situation involving a live, concrete controversy concerning competing jurisdictional claims between State and Federal agencies over an important segment of interstate air transportation. The District Court's finding that it was unnecessary for Appellees to submit to an expensive State proceeding is also clearly supported by the record. Realistically viewed, the State Commission had already reached a decision on the question of its jurisdiction before the Appellees brought this suit and the available State remedies were inadequate to review the Commission's decision.

The doctrine of exhaustion of administrative remedies should not be applied in the instant case where a state agency claims jurisdiction over an activity that has been subject to exclusive federal control for a period of 12 years and where the State's challenge to the federal agency's jurisdiction raises only questions of law.

By promptly eliminating incipient discord concerning the boundaries of authority between State and Nation, the District Court's decision maintained the delicate balance required by our federal system. The District Court acted well within its discretion in granting injunctive and declaratory relief and in deciding the case on its merits, especially because the case demanded resolution of important federal questions under the Federal Constitution and under a federal statute vesting exclusive regulatory concern in a federal agency.

The greatest portion of the flight between Catalina Island and the mainland of California is through the air space over a place outside the State of California. Therefore, this transportation falls directly within the definition of "interstate air transportation" in the Civil Aeronautics Act. The nature of air traffic, the legislative history and broad scope of the Civil Aeronautics Act illustrate beyond doubt that there is no room here for state regulatory action.

Although it comes within the statutory definition of "interstate air transportation," air traffic between Catalina Island and the California mainland is "foreign commerce" in the constitutional sense. This, and the unequivocal language of the statute, demonstrate the complete irrelevance of cases relied on by Appellants which invoke presumptions against the extension of general or doubtful Federal regulations to intrastate commerce.

ARGUMENT.

I. THE CASE BELOW WAS PROPERLY HEARD AND DECIDED BY A THREE-JUDGE DISTRICT COURT, AND THIS COURT THEREFORE HAS JURISDICTION BY DIRECT APPEAL.

The purpose of the various three-judge court statutes that Congress has enacted from time to time was to eliminate the feared propensity of federal judges to enjoin state statutes and administrative orders, and to safeguard against precipitate action by a single judge in setting aside the solemn legislative acts of the States. Congress sought to insure that State legislation would not be enjoined by the federal courts without mature deliberation by more than one District Judge, Moore, *Commentary on the U. S. Judicial Code*, 52 (1949); Hutcheson, *A Case for Three Judges*, 47 Harv. L. Rev. 795, 803 (1934).

The applicable statute provides as follows:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." 28 U. S. C. 2281.

In this case, Appellees' contentions meet every requirement of Sec. 2281. The State statute challenged was one of general application. *Ex parte Collins*, 277 U. S. 565 (1928), Frankfurter and Landis, *The Supreme Court under the Judiciary Act of 1925* (1928), 42 Harv. L. Rev. 1, 27. *Rorick* v. *Commissioners*, 307 U. S. 208 (1939).

The claim of unconstitutionality was vigorously pressed. *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386, 392 (1934). The relief sought was directed against State officials charged with the responsibility under Sec. 2104 of the California Public Utilities Code[2] of enforcing the statute. *Ex Parte Public Bank of New York*, 278 U. S. 101 (1928).

In attacking the constitutionality of the California penalty statute (Sec. 2107, California Public Utilities Code, *supra*, p. 8), Appellants pointed out that the penalties prescribed by the statute range up to $2,000.00 for each offense and called the Court's attention to Sec. 2108 which provides that:

> "Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand or requirement of the commission, by any corporation or any person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

Therefore, penalties up to $730,000 could accrue in a single year. Appellees contended that Appellants could bring suit to recover penalties at any time within the applicable limitations period and further pointed out that Sec. 2104

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2. "2104. Actions to recover penalties under this part shall be brought in the name of the people of the State of California, in the superior court in and for the county, or city and county, in which the cause or some part thereof arose, or in which the corporation complained of has its principal place of business, or in which the person complained of resides. Such action shall be commenced and prosecuted to final judgment by the attorney of the commission. In any such action, all penalties incurred up to the time of commencing the action may be sued for and recovered. In all such actions, the procedure and rules of evidence shall be the same as in ordinary civil actions, except as otherwise herein provided. All fines and penalties recovered by the State in any such action, together with the costs thereof, shall be paid into the State Treasury to the credit of the General Fund. Any such action may be compromised or discontinued on application of the commission upon such terms as the court approves and orders."

specifically provides that "In any such action, all penalties incurred up to the time of commencing the action may be sued for and recovered." In addition, Sec. 2105 states that "All penalties accruing under this part shall be cumulative * * *." Therefore, Appellees contended that Appellants had the opportunity to assert liability for cumulative penalties wholly disproportionate to the seriousness of the claimed violation, that the threatened penalties were consequently excessive, oppressive, and violative of the Fourteenth Amendment and, further, that the threatened penalties constituted an unreasonable burden on interstate and foreign commerce. (R. 5, 6.) *Ex parte Young*, 209 U. S. 123 (1908). *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165 (1910), *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920). Accordingly, the court below found that a substantial question as to the constitutionality of the penalty provisions of the California statutes was presented. (R. 62.)

Only after the three-judge court had convened, and only after hearing the evidence and considering the contentions of the parties, did the court find it unnecessary to decide the question of the constitutionality of the state statute. Applying the familiar rule that federal courts should refrain from invalidating statutes on constitutional grounds when there are other adequate grounds for decision, the court below found other federal questions before it which were determinative of the issues. (R. 48-49.)

This Court has decided on several occasions that the jurisdiction of a three-judge court existing by reason of the presence of a substantial constitutional question "extends to every question involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." *Sterling* v. *Constantin*,

287 U. S. 378, 393-394 (1932); *California Water Service Co.* v. *Redding*, 304 U. S. 252, 255-256 (1938). "A District Court composed of three judges under Section 266 of course has jurisdiction to determine every question involved in the litigation pertaining to the prayer for injunction, in order that a single law suit may afford final and authoritative decision of the controversy between the parties." *Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 312 U. S. 621, 625 (1941). See also *Railroad Commission* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 391 (1938).

Not satisfied with the commendable approach of the District Court of refraining from making decisions on constitutional issues when others will suffice, Appellants suggest that the court should have dissolved itself. But what purpose would have been served by dissolution? The court had already heard the evidence and the arguments and was familiar with all aspects of the case. The court was in a position to render in a single law suit a final and authoritative decision of the controversy. *Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, *supra*. Dissolution of the court would have meant prolonged litigation with its attendant burdens and expenses upon the parties and the time of the courts. In dissolving itself the court would have left a cloud over the jurisdiction long exercised by the Civil Aeronautics Board over an important segment of air transportation. The decision and approach of the court below was consistent with sound and orderly judicial administration by promptly and expeditiously deciding the case.

Prior decisions of this Court make it abundantly clear that a three-judge court's jurisdiction and the jurisdiction of this Court by direct appeal do not expire when a decision on constitutional claims is unnecessary to disposition

of a case. *Winchester* v. *Winchester Water Works,* 251 U. S. 192 (1920); *Moore* v. *Fidelity & Deposit Co.,* 272 U. S. 317 (1926); *Query* v. *United States,* 316 U. S. 486 (1942).

The cases cited by Appellants in their brief (p. 39) miss the point. In *California Water Service Co.* v. *Redding,* 304 U. S. 252 (1938), this Court held that the three-judge court should have been dissolved because the plaintiffs did not present a *substantial* federal question. *City of Springfield* v. *United States* was a case in which this Court denied certiorari (306 U. S. 650, 1939) after the Court of Appeals for the First Circuit decided that a three-judge court was not required because: (1) the suit was not brought to restrain a statute, but merely an assessment; (2) the suit was not brought against a State officer, but against an officer of a city; (3) the suit was not grounded upon the constitutionality of a State statute. 99 F. 2d 860, 862 (1938). *Case* v. *Bowles,* 327 U. S. 92 (1946) and *Ex parte Bransford,* 310 U. S. 354 (1940) hold merely that suits brought to enjoin the enforcement of State statutes on the ground that such enforcement would violate a federal statute do not require the convening of a three-judge court because such suits do *not* challenge the constitutionality of the State statute and involve only questions of statutory construction. 327 U. S. at 97, 310 U. S. at 359. The two District Court cases relied upon by Appellants (*Farmers Gin Co.* v. *Hayes,* 54 F. Supp. 43, D. C. W. D. Oklahoma 1943, and *Penn. Greyhound Lines* v. *Board of P. U. Comm'rs.,* 107 F. Supp. 521, D. C. New Jersey, 1952) follow the holdings in *Case* v. *Bowles* and *Ex parte Bransford.*

These decisions would be relevant if Appellees' attack upon the California penalty statute rested only on the ground that it conflicted with the Civil Aeronautics Act. But what Appellants conveniently omit in their argument

is the fact that Appellees presented a substantial constitutional question to the District Court by their entirely independent contention that the threatened enforcement of the penalty statute would violate the Fourteenth Amendment and would also interfere with Congressional power under the Federal Constitution to regulate commerce. Therefore, Appellants' cited authorities simply have no pertinence to this case.

Moreover, Appellees call attention of this Court to *Public Utilities Commission of Ohio* v. *United Fuel Gas Co., et al.*, 317 U. S. 456 (1943), which involved an attempt by the Ohio Public Utilities Commission to assert jurisdiction over an interstate gas company. A municipal ordinance of Portsmouth, Ohio established rates for natural gas sold in that city by a local utility. The local utility purchased its entire supply of gas from United Fuel Gas Company, a West Virginia corporation. When the local utility challenged the rates fixed by the city before the Ohio Public Utilities Commission, the Commission agreed that the local utility's rates had been unfairly set under the municipal ordinances. However, the Commission found that it could not set fair rates for the local utility in the absence of proof that the charges which United Fuel exacted from the local utility were just and reasonable. Accordingly, the Commission ruled that the sale of gas by United Fuel to the local utility and the rates to be charged for such service were subject to its jurisdiction.

United Fuel, claiming that its sale to the local utility was in interstate commerce, contended that the Ohio Commission had no jurisdiction over the rates charged. United Fuel offered to provide the Commission with evidence relevant to a determination of just and reasonable rates to be charged by the local utility for gas sold at retail to the people of Portsmouth. The Commission rejected this

offer and reaffirmed its previous assertion of jurisdiction over the rates to be charged for the sale of gas by United Fuel to the local utility. United Fuel then went to a three-judge federal court to restrain enforcement of the Commission's order, contending that the Commission's order was an unconstitutional attempt to regulate interstate commerce. It was stipulated by the parties that it would cost United Fuel in excess of $3,000 to comply with the Commission's order. United Fuel also claimed that if it disobeyed the Commission's orders it and its agents would be subject to substantial fines and penalties.

While the suit was pending in the three-judge court, Congress passed the Natural Gas Act of 1938. (52 Stat. 821, 15 U. S. C. Sec. 717.) The three-judge court later held that regardless of what the situation might have been in the absence of the Natural Gas Act, that statute deprived the Ohio Commission of power to regulate the rates to be charged for gas transported and sold in interstate commerce. 46 F. Supp. 309 (1941). Accordingly, the three-judge court enjoined the enforcement of the Commission's orders against United Fuel. The three-judge court found it unnecessary to discuss or consider the constitutional claim.

On direct appeal, this Court affirmed the decision of the three-judge court. 317 U. S. 456 (1943). Also finding it unnecessary to reach or decide the constitutional question, this Court placed its decision entirely upon the ground that the Natural Gas Act had vested the power to fix rates for natural gas transported and sold in interstate commerce exclusively in the Federal Power Commission.

The similarity between *United Fuel* and the instant case is striking. There, as here, a three-judge court was properly convened to consider a claim that a State statute violated the Federal Constitution. There, as here, the

three-judge court found it unnecessary to reach or decide the constitutional question, and placed its decision on the ground that a federal statute had pre-empted the field. There, this Court affirmed the action of the three-judge court, also finding it unnecessary to decide the constitutional question.

This case falls squarely within the holding and doctrine of *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*[3]

II. THE DISTRICT COURT PROPERLY AWARDED INJUNCTIVE AND DECLARATORY RELIEF.

Appellants contend that the District Court, whether sitting as a statutory three-judge court or as an ordinary District Court, improperly granted injunctive and declaratory relief. Appellants maintain:

1. That Appellees failed to make a showing of threatened irreparable injury sufficient to justify injunctive relief,[4] and that the District Court abused its discretion in awarding declaratory relief;

2. That Appellees had not exhausted their administrative and State court remedies; and

3. That, in any event, the District Court should

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3. If this Court should decide that the three-judge court was improperly convened, or that even though properly convened, the three-judge court should have dissolved itself after deciding that it was unnecessary to decide the constitutional question, the judgment below is nevertheless 'the final order of the district court. * * *' *Stainback* v. *Mo Hock Ke Loh Po*, 336 U. S. 368, 381 (1949). The only effect of such a decision would be to eliminate the jurisdictional basis under 28 U. S. C. 1253 for a direct appeal to this Court. *Gully* v. *Interstate Nat. Gas Co.*, 292 U. S. 16, 19 (1934); *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 392 (1934).

4. The contention that Appellees failed to show threatened irreparable injury also bears upon the issue of whether the three-judge court properly assumed jurisdiction over the controversy.

have stayed its hand in the interest of maintaining a proper federal-state relationship.

A. The Record Supports the Finding of Threatened Irreparable Injury by the District Court and Justifies the Award of Injunctive Relief; the District Court Properly Granted Declaratory Relief.

1. Appellants' contentions concerning proof of threatened irreparable injury really seek to overrule the finding of fact of the District Court on this issue. Therefore, the problem is determining whether the District Court's findings are supported by the record.

The District Court found:

> "12. Statutes of the State of California provide for penalties in an amount up to and including $2,000 for each day that operations are conducted by carriers without effective tariffs being on file with the defendant Public Utilities Commission. The defendants in the past have asserted that these statutory penalties are applicable to air carriers, and have caused proceedings to be instituted in the California Courts for the recovery of these penalties against various air carriers, including the defendant [fol. 87] United, in other cases wherein disputes have existed concerning the regulatory jurisdiction of the defendant Public Utilities Commission.
>
> "13. The refusal of the plaintiff United to heretofore comply with the directives of the defendant Commission to file tariffs, and any refusal to comply with any future such directive, has and will subject United to the risk of incurring the mentioned heavy penalties, or, if these penalties are not applicable to air carriers as United contends, to the risk of incurring substantial expenditures in defending against suits for the recovery of penalties. Apart from these risks, United is confronted with the necessity for incurring the expenditures incident to defending a proceeding certain to be instituted before the defendant

> Commission unless this Court resolves the controversy presented. No provisions exist under which United may recover its expenditures from the defendants, and these certain and possible expenditures may ultimately be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United." (Findings 12-13; R. 60-61.)

It must be emphasized that the court below had the opportunity at first hand to hear the testimony of the witnesses and weigh the evidence. The court below was familiar with the context in which this suit arose. The evidence established that the Commission had in the past demanded that United pay penalties as a result of proceedings brought by the Commission in the courts of California arising from earlier disputes concerning the regulatory jurisdiction of the Commission. Litigation concerning these penalties demanded by the Commission is still pending in the California courts. Consequently, there was nothing fanciful or imaginary about the risks which United feared in this case—especially in the light of the prior and presently pending litigation with the very same Commission. In addition, United was aware of Section 2113 of the California Public Utilities Code, which provides:

> "2113. Every public utility, corporation, or person which fails to comply with any part of *any order, decision, rule, regulation, direction, demand,* or *requirement of the commission* or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto." (Emphasis added.)

The peril of contempt proceedings, therefore, was genuine and substantial.

Moreover, United recognized that if it submitted to the State Commission's jurisdiction, it might well subject itself to penalties under the Civil Aeronautics Act because it was already obligated by law not to charge rates for the route different from those already established in its tariffs on file with the Civil Aeronautics Board. 49 U. S. C. 622 (d) and 49 U. S. C. 483.[5]

Judge Goodman said during the hearing for a motion for new trial:

> "[United] doesn't want to get caught in between the two juggernauts approaching him, one from each side, and he doesn't want to get caught in between." (R. 250.)

At the same hearing, Judge Orr said:

> "* * * I think the activating motive in the first instance in bringing this action was the fear of imposition of this thousand dollars a day—isn't it?—or something of that kind—that penalty, and if they waited some length of time and finally lost out, that would be a rather irreparable injury, and they were in a sort of a, as Judge Goodman put it, between two pincers here * * *. If they were to stand by and let you go ahead and you saw fit later to impose those penalties, they were in a bad fix." (R. 257.)

Nevertheless, Appellants seem to think that this "bad fix" United was in was not enough to establish threatened irreparable injury. In making their contention, Ap-

5. In this connection we note that United was required under its 1946 contract to discharge all of the obligations of Catalina Air Transport under the certificate of public convenience and necessity granted to it by the Civil Aeronautics Board. (R. 59.) The State Commission's tardy intrusion into the Catalina air operation could seriously jeopardize this long standing contractual relationship and confront United with yet another threat of irreparable injury. *Columbia System* v. *United States*, 316 U. S. 407 (1942). Such "threats of damage are direct and immediate in a very practical sense." *B. F. Goodrich* v. *Federal Trade Commission*, C. A. D. C. July 16, 1953 (CCH Trade Reg. Reporter 1953, par. 67-535).

pellants must face up to the burden of establishing that the District Court's finding on the point is not supported by the record. Appellants overlook that during the hearing on the motion for a new trial, Judge Murphy stated that the District Court's finding on threatened irreparable injury was:

> "* * * *the nub of our decision.* We held as a matter of fact, intent is a question of fact, that you had threatened irreparable injury. We found that." (Emphasis added.) (R. 255.)

But Appellants now argue, contrary to the findings of the District Court, that United was not in fact subject to the risk of penalties for its failure to comply with the Commission's directives. Appellants first assert that these directives were not "orders", and secondly, that United was under no duty to file its tariffs with the Commission until the Commission after a formal proceeding, "effectively" ordered United to file. (Appellants' Brief, pp. 21-24.)

With respect to the first contention, it is enough to point out that the penalty statute and the contempt statute are not limited in their application to disregard of an "order" of the Commission, but expressly apply to failure to comply with any "direction, demand, or requirement of the Commission." (Secs. 2107 and 2113 of the California Public Utilities Code.) Certainly, the Commission's letters which "instructed" United to file its tariffs plainly amounted to a "direction, demand, or requirement of the Commission."

Appellants, in this Court, now characterize the letters as merely "administrative letters"—as if this new label removes their sting. Appellants concede that the Secretary of the Commission did not send the letter under his own limited authority (Secs. 308 and 311 of the California Pub-

no help to Appellants. Here, as we have shown, there have been two completed administrative adjudications. In any event, the declaration in *Rochester* as to what there was considered reviewable cannot logically be said to have been so all-inclusive as to have been an announcement of that which was not reviewable. Appellants further muddy the theoretical waters by injecting cases dealing with unsuccessful attempts to raise the issue of "coverage" in proceedings to enforce administrative subpoenas. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501 (1943); *Tobin* v. *Banks and Rumbaugh*, 201 F. 2d 223 (C. A. 5, 1953). There is no issue here of sterilization of administrative investigative powers; and, the only "maelstrom of confusion" observable is that into which Appellants have plunged Appellees, causing them to seek the protection of the Federal courts. A decision of the issues here will not be "premature" as in *Banks and Rumbaugh*, but rather overdue if the gestation period of Appellants' claims is considered.

The Reasons Underlying the Doctrine of Exhaustion of Administrative Remedies Are Absent Here.

In their brief, Appellants do not discuss the reasons underlying the doctrine of exhaustion of administrative remedies as a condition precedent to judicial consideration. The basic reasons for the rule are to take full advantage of administrative expertness, and to insure that an administrative agency has an opportunity to first decide the questions involved. See Cooper, *Administrative Agencies and the Courts*, (Michigan Legal Studies 1951) pp. 316-322. Close analysis demonstrates that none of these reasons is applicable in this case.

The issues involved in this case are purely legal ques-

lic Utilities Code),[6] but that the Commission itself authorized the sending of the letters. (Appellants' Brief, p. 23.) Appellants point to nothing in the Public Utilities Code or the Commission's Rules of Procedure which authorizes or defines an "administrative letter." There not only is no indication whatever that so-called "administrative letters" do not amount to a "direction, demand or requirement of the Commission," but the Commission itself, in its Brief (p. 23) states that such letters are sent "calling to the attention of the utility that it appears that such utility is violating the law and *directing corrective measures to be taken.*" (Emphasis added.)

Appellants' second contention, that United was under no duty to file tariffs until directed to do so by the Commission after a formal proceeding and investigation and final determination of the jurisdictional question by the Commission, does not weaken the finding of threatened irreparable injury below. Certainly, the District Court did not abuse its discretion in relying upon the Commission's original position that the tariffs were required to be filed. If, as the Commission somewhat belatedly contends, there was no legal duty on United to file, what gave the Commission the right to "instruct" United that it must file? If United was to be obligated to file only after a formal hearing and order, what meaning is to be

6. 308. "The commission shall appoint a secretary, who shall hold office during its pleasure. The secretary shall keep a full and true record of all proceedings of the commission, issue all necessary process, writs, warrants, and notices, and perform such other duties as the commission prescribes."

311. "The commission, each commissioner, the secretary, and the assistant secretaries may administer oaths, certify to all official acts, and issue subpoenas for the attendance of witnesses and the production of papers, waybills, books, accounts, documents, and testimony in any inquiry, investigation, hearing, or proceeding in any part of the State.

The examiners may administer oaths, examine witnesses, issue subpoenas, and receive evidence, under such rules as the commission adopts."

given to the Commission's statement in the concluding paragraph of its December 27, 1951, letter to United's counsel that "In view of our interpretation of the Civil Aeronautics Act and the California Constitution, we again instruct your client, United Air Lines, Inc., to file with this Commission * * *." (R. 46.) The Commission obviously had taken its stand on a legal issue. To say that it might reach a different decision after a "formal investigation" is to ignore the fact that there was nothing to investigate. Its mind was closed.

Appellants in their argument miss this fundamental point. United was faced with a very real *risk* that penalties would be sought because of a claimed violation of a Commission directive, and with the risk of incurring the expense of defending against penalty suits in the future. (Finding of Fact 13, R. 61.)

In view of the provisions of Sec. 2101 of the California Public Utilities Code directing that penalty actions shall be "promptly prosecuted" by the Commission, the past action of the Commission in instituting penalty actions against United for claimed violations of its regulatory jurisdiction, and the potential dangers of reparation and damage suits which might be brought by the Commission, the District Court's finding that United had established threatened irreparable injury is clearly supported by the record.

Furthermore, the District Court found, in support of its equitable jurisdiction, apart from the risks of penalty and reparation suits, "United is confronted with the necessity for incurring the expenditures incident to defending a proceeding certain to be instituted before the defendant Commission unless this Court resolves the controversy presented." (R. 61.) The Court further found that "no provisions exist under which United may recover its

expenditures from the defendants, and these certain and possible expenditures may ultimately be borne in whole or in part by the traveling public either in the form of increased transportation charges or less efficient service by United." (R. 61.) The District Court further found that the cost of defending such a proceeding will exceed $3,000, for which the Appellees will not be recompensed. (Finding of Fact 11; R. 60.) Again this is strikingly similar to the factual situation which prompted this Court to affirm the award of injunctive relief in *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456 (1943). There, this Court said:

> "If, therefore, United complies with these orders, it will be put to the expenditures incident to ascertaining the base for rate-fixing purposes—expenses which may ultimately be borne by the consuming public and which Congress, by conferring exclusive jurisdiction upon the Federal Regulatory Agency, necessarily intended to avoid. If United does not comply with the orders, it runs the risk of incurring heavy findings and penalties or, at the least, in provoking needless, wasteful litigation. In either event, enforcement of the Commission's orders would work injury not assessable in money damages, not only to the appellee but to the public interest which Congress deemed it wise to safeguard by enacting the Natural Gas Act. In these circumstances, we cannot set aside the decree of the District Court as an improper exercise of its equitable jurisdiction." (317 U. S. 456, at 469.)

Appellants readily concede that they intend to require Appellees to appear and defend in a proceeding before the Commission, which is certain to be an empty formality. The Chief Counsel stands ready to "again advise the Commission in the proceeding which will be instituted by the Commission that the Commission has and should assert jurisdiction over the operations here involved • • •." (Finding of Fact 11, R. 60.) These facts certainly demon-

strate the existence of risks "sufficiently imminent and certain to justify the intervention of a court of equity." *City Bank Co.* v. *Schnader*, 291 U. S. 24, 34 (1934). "One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 593 (1923). *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145 (C. A. 5, 1936), certiorari denied 298 U. S. 688 (1936).

2. Appellants also attack the award of declaratory relief by the District Court. Appellants confuse the issue by implying that threatened irreparable injury is not only a prerequisite to the issuance of injunctive relief, but is also needed to justify a declaration of the rights of the parties. This is simply not so.

The contrary was made clear by this Court over twenty years ago in its landmark decision in *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249 (1933). Mr. Justice Stone wrote an opinion for a unanimous Court which affirmed an award of declaratory relief under a Tennessee declaratory judgment statute to a carrier which sought to establish that a state excise tax levied on the storage of gasoline was, as applied to the carrier, invalid under the commerce clause and the Fourteenth Amendment of the Federal Constitution. The Court stated, in unequivocal language:

> "As the prayer for relief by injunction is not a necessary pre-requisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial." 288 U. S. at 264.

See also *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 241 (1937); *Texas* v. *Florida*, 306 U. S. 398, 411-412 (1939); *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145,

149 (C. A. 5, 1936), certiorari denied 298 U. S. 688 (1936); Note, *Need for Injunctive Relief As Pre-requisite for Granting Declaratory Judgment*, 56 Yale L. J. 139 (Borchard) 1946; *Developments—Declaratory Judgments*, 62 Harv. L. Rev. 787, 867 (1949); Borchard, *Declaratory Judgments*, (2d ed. 1941) 195-197, 365. In the recent decision by this Court in *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U. S. 237 (1952), this Court implicitly recognized that proof of threatened irreparable injury essential to injunctive relief is not a prerequisite to the award of declaratory relief. Furthermore, it must be remembered that a declaration may be given whether or not an injunction is also sought. The Federal Declaratory Judgments Act expressly provides that the declaration may be issued "whether or not further relief *is or could be sought.*" (Emphasis added.) 28 U. S. C. 2201.

Moreover, as a matter of logic and common sense, there should be no requirement of a personal threat by government officials to enforce a statute to justify either injunctive or declaratory relief. Legislatures do not pass statutes with the expectation that they will not be enforced. It cannot be assumed that officials charged with the responsibility of enforcing statutes will disregard their duty. It is the statute itself which creates the jeopardy, cloud, and uncertainty, not the possible inaction of state officials. This has been made plain by this Court in such cases as *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925) and *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926). A situation can be instinct with the threat of enforcement without tempers flaring or ultimatums being issued. The true test for relief should be whether in view of all the surrounding circumstances, considered as a totality, a reasonable man would believe that he was in peril.

Another contention of Appellants also confuses the pro-

priety of the award of declaratory relief in this case. Appellants insist (Appellants' Brief, p. 25) that United should have placidly accepted "the expense and annoyance of litigation. * * * [as] a price citizens must pay for life in an orderly society * * *", citing such cases as *Paulos* v. *New Hampshire*, 345 U. S. 395 (1952), *Petroleum Exploration Inc.* v. *Public Service Commission of Kentucky*, 304 U. S. 209 (1937), and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). But the price of civilization is today expensive enough without including completely unwarranted and unnecessary proceedings before State agencies lacking jurisdiction over the subject matter.

Furthermore, Appellants misconceive the nature of declaratory relief. A judicial declaration of rights seeks to eliminate the expenses of needless litigation. Appellants cannot improve Professor Borchard's excellent analysis of the social utility of declaratory relief in a case such as this. Professor Borchard states:

> "Those who have rights under contract or statute are frequently faced with a threat or risk of breach or violation by the defendant. Their fear of loss and prejudice persuades them to seek to avoid a breach by suing for a declaration of their rights. Such a declaration serves as a warning to the defendant and reassures the plaintiff in the enjoyment of his rights. It removes the cloud generated by the threat or danger of improper action by the defendant, confirms the plaintiff's rights, and stabilizes a doubtful or uncertain or challenged legal relation. It thus serves a most important social function in settling disputed rights at the inception of the controversy, saves from destruction and violence an existing *status quo*, preserves contracts against threatened breach, holds parties to their contractual and statutory duties, and avoids the economic and social damage which breach would entail. It acts as a preventive and conservatory measure, saving existing relationships from the risks of breach,

violation, injury, and destruction. Issue is joined while the relationship still exists and before irretrievable losses have occurred by reason of one or the other party acting upon his own interpretation of his rights." Borchard, *Declaratory Judgments*, 1008-1009 (2d ed. 1941).

This case involving competing claims over an air transportation route by State and Federal agencies is uniquely suited for declaratory relief. The controversy was real and had reached the stage where it was ripe for adjudication. See discussion pp. 48-49, *infra*. The decision below contributed to the maintenance of an orderly society with a minimum of expense and annoyance to the air carriers, the State, and the Federal Government.

B. United Was Not Required to Take Further Steps Before the Commission Nor to Apply to the State Courts for Relief Before Instituting This Action in the Federal Courts.

Appellants next argue that the District Court should not have granted relief because Appellees failed to exhaust their State administrative remedies. This argument is advanced despite the absence of any indication by the Commission prior to the trial that it did not consider its letters to Appellees as definitive administrative determinations.

The Commission asserted jurisdiction over the Catalina operations on September 20, 1951 when it "instructed [United] to file with this Commission the tariffs covering the service in question." (R. 40.) United sought what amounted to reconsideration of this determination in its letter of December 5, 1951. (R. 42-43.) On December 27, 1951 the Commission, in effect, denied reconsideration and

concluded its December 27, 1951 letter in the following unequivocal language:

> "In view of our interpretation of the Civil Aeronautics Act and the California Constitution *we again instruct* • • • United Air Lines, Inc. to file with this Commission the tariffs covering the service between Avalon and Long Beach-Los Angeles." (R. 46, emphasis added.)

It is noteworthy that the December 27, 1951 letter was signed by the Secretary of the Commission, despite the fact that United's December 5, letter had been addressed to the Assistant Counsel for the Commission. In the Commission's letter of December 27, 1951, the Commission stated that United's December 5, letter to the Commission's Assistant Counsel "has been referred to [the Office of the Secretary of the Commission] for reply." (R. 44.) Moreover, it is significant that in the Statement as to Jurisdiction filed by Appellants in this Court, Appellants themselves pointed out that the Commission's letters *"were sent after considering the contentions of plaintiff United* • • •" (Appellants' Statement as to Jurisdiction, p. 19.)

Earlier in this brief, Appellees have pointed out that Appellants now characterize these letters as simply "administrative letters"—and as "one of the most efficient and time-saving features of administrative procedure • • •." (Appellants' Brief, p. 23.) In their brief, Appellants concede that such letters were sent on the authority of the Commission itself and that such letters direct that corrective measures be taken by the recipient. (Appellants' Brief, p. 23.) Such "administrative letters" are sent by the Commission "with the hope that corrective measures will be taken and a formal proceeding will be obviated." (Appellants' Brief, p. 24.)

Does the Commission seriously contend that these letters did not result from its deliberate decision to assert

jurisdiction over the Catalina route? Suppose United had complied with the directions to file its tariffs with the Commission. Would the Commission then have reconsidered its position? Of course not. This would have been the end of the matter. If United had been willing to bow to these directions by the Commission, the question of the Commission's jurisdiction would have been closed. For the Commission to indicate now that it has an open mind on the question of its jurisdiction is nothing more than an attempt to repudiate its prior directions. Furthermore, the contention that the California Public Utilities Commission would approach a consideration of this problem with an open mind seems even more improbable in the face of the California Statute of 1949, (Secs. 170, 171, California Government Code, Appellants' Brief, Appendix A, pp. ii, iii). In that statute, the California Legislature, in effect, declared the waters between Catalina Island and the mainland to be inland waters. Is it likely that the Commission—which describes its "processes" to be "quasi-legislative" (Appellants' Brief, p. 36)—would hold that the waters are outside the State of California and thus destroy the very purpose of the statute?

In view of these repeated directions to United to file its tariffs with the Commission, the plain language of the directives, and the fact that United's last letter had been answered officially by the Commission rather than by its counsel, there was absolutely nothing present in the situation to indicate that the Commission desired, or would even permit, further administrative action before United filed its tariffs with the Commssion, or would conceivably reverse its determination of jurisdiction over the Catalina route. Fairly read, these instructions from the Commission are not susceptible of the interpretation, now urged by the Commission, that they were not compulsive but

were merely preliminary warnings of an impending investigation of United's operations.

That the letters from the Commission were much more than a "first step in the administrative process" is well illustrated by Judge Orr's observations during the hearing on the motion for preliminary injunction. (R. 221.):

> "I know if I were in the position of the air lines and got a letter like that, I would commence to do something. I think I would better do something right away, either send [fol. 406] the tariffs or tell them the circumstances.
>
> "That seems to me like an order, a direct order, and what may be back of it, I think I am logical in saying that that does not convey to the party—no matter what their intention may have been, that letter does not convey that impression to the person receiving it. It means that the party receiving it, you better comply with this, you do this thing—that's it. And I received it, I would feel I better do that or take some other action to challenge their jurisdiction or do something else, because otherwise I might get into very serious trouble."

Judge Murphy said at the same hearing, in addressing Commission counsel (R. 222-223):

> "Well, I can't reconcile your argument, the argument that you are making now, with your letter of December the 27th, 1951, the last paragraph of which says:
>
> " 'In view of our interpretation of the Civil Aeronautics Act and the California Constitution, we again instruct your client, United Air Lines, Inc., to file with this Commission the tariffs covering the service between Avalon and Long Beach, Los Angeles.'
>
> "Now if that isn't a definite order, I don't know what is.
>
> " 'We again instruct your client'—
>
> "Judge Orr: That is the second time!
>
> "Judge Murphy: That is the second time.
>
> "Mr. Phelps: Yes. Well, as I say, it was couched

in terms of an order, to be sure, but in terms of an order that the Commission felt followed naturally from its expression [fol. 409] of its opinion as to its jurisdiction. But it does not seem to follow that there is an implied threat there that if you don't do it you will be subject to penalty actions.

"Judge Murphy: Any reasonable man reading a letter of that kind would certainly interpret it."

As Judge Orr and Judge Murphy observed in the hearing below, United was faced with an explicit direction to file its tariffs with the Commission. Under these circumstances, the suit was not prematurely instituted. *City Bank Co.* v. *Schnader*, 291 U. S. 24, 34 (1934); *New York Central Railway Co.* v. *New York and Pa. Co.*, 271 U. S. 124 (1926).

Furthermore, even if the letters were the beginning of an administrative proceeding, as Appellants now assert, it was not until *after* denial of United's request for reconsideration that this suit was instituted. No further exhaustion of administrative remedies on the part of United was required. As this Court pointed out in *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, at 465 (1943):

"The Commission in this case has not yet done more than assert its jurisdiction over United's rates. It has not yet held a hearing upon the reasonableness of United's present rates; it has made no finding whether these rates are unlawful and whether new rates should be substituted; it has not entered upon inquiry to determine what rates would be just and reasonable." (317 U. S. at 465.)

Nevertheless, in the *United Fuel Gas* case this Court affirmed the award of injunctive relief.

Rice v. *Santa Fe Elevator Corporation*, 331 U. S. 218 (1947), is an even stronger case in point. In *Rice*, a complaint was filed against certain grain elevators before

the Illinois Commerce Commission. The elevators' motion to dismiss the complaint on the ground that the State Commission had no jurisdiction was denied by the Commission, which then set a date for a formal administrative hearing. Without more, the elevators went to the Federal District Court and asked that further proceedings before the Illinois Commission be enjoined on the ground that the United States Warehouse Act superseded state regulation of warehousemen licensed thereunder as to the matters presented in the complaint. The District Court dismissed the suits, but the Court of Appeals reversed. The decision of the Court of Appeals was affirmed by this Court, 331 U. S. 218 (1947).[7] Similarly, in *Cloverleaf Co.* v. *Patterson*, 315 U. S. 148 (1942), this Court affirmed an award of injunctive relief by a Federal District Court without any showing of exhaustion of State administrative remedies.

In an even more recent case, *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 (1949), this Court clearly pointed out that exhaustion of administrative remedies is not an ironclad requirement but rather a flexible rule of judicial discretion. In the *Panhandle* case, the Federal Power Commission sought an injunction in a federal District Court to preserve the status quo until the Commission could itself investigate and determine whether a proposed transfer of natural gas leases might have violated the Natural Gas Act. This Court affirmed the denial of injunctive relief after deciding that the Commission's jurisdiction did not extend to the transfer of the leases—a matter which the Commission itself had not yet passed upon. In denying the Commission's contention that the transfer should not have been enjoined until the Com-

7. The Court of Appeals decision was in part reversed with respect to the application of the United States Warehouse Act to certain activities of the elevators, but this point is not material here. 331 U. S. 238.

mission could determine its own jurisdiction, this Court pointedly remarked that the Commission "should not be permitted to delay what it cannot prevent." 337 U. S. at 515.

These decisions make it plain that an absolute exhaustion of State administrative remedies is not always a prerequisite to the proper exercise of Federal jurisdiction. See *Exhaustion of State Remedies and the Three Judge Court*, 46 Ill. L. Rev. 756, 761 (1951).

Cases Relied On By Appellants.

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), which Appellants rely upon so heavily, is completely distinguishable from this case. In the *Myers* case, this Court stated the issue to be

> "whether a federal District Court had equity jurisdiction to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by the National Labor Relations Act * * *." 303 U. S. at 43.

This Court decided that a district court had no such jurisdiction because, in the Court's words, "the power 'to prevent any person from engaging in any unfair practice affecting commerce' has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: 'This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise.' ". 303 U. S. at 48. Therefore, the *Myers* case has nothing to do with this case, where the existence of federal jurisdiction is clear. The problem here is not whether the District Court has power to decide the case, but whether the District Court should have declined to exercise its power. The exhaus-

tion doctrine has no application where a suit is instituted in a court which has no jurisdiction to entertain the case in the first place. The discussion in the *Myers* opinion concerning exhaustion of administrative remedies was therefore unnecessary to disposition of the case because the federal statute there involved explicitly denied jurisdiction to the District Court.

Similarly, in *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540 (1946) the applicable statute empowered the administrative board to rule on the question of coverage; and, in *Macauley*, review *de novo* was provided in the Tax Court which Congress intended to have *exclusive jurisdiction* to decide questions of fact and law. Therefore, as in *Myers*, the District Court lacked power to hear the suit, and the "exhaustion" argument would appear to have been dicta. *Federal Power Commission* v. *Arkansas Power and Light Company*, 330 U. S. 802 (1947) is likewise inapplicable. There, the District Court held that it had no jurisdiction because the Federal Power Act provided that review of an order of the Federal Power Commission was available only in the Court of Appeals and in this Court. 60 F. Supp. 907 (D. C. D. C., 1945); See 156 F. 2d 821 (C. A. D. C. 1946) for opinion of the Court of Appeals. The "exhaustion" doctrine presupposes that the court to which it is addressed has jurisdiction of the case. If the court does not have jurisdiction the exhaustion or non-exhaustion of administrative remedies is totally irrelevant.

Other cases relied on by Appellants in this connection are even more beside the point than *Myers*, *Macauley*, and *Arkansas*, *supra*. Obviously *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125 (1939), holding that an administrative order objected to was reviewable because it was not a mere abstract declaration nor a stage in an incomplete process of administrative adjudication, is of

tions concerning Federal vis-a-vis State jurisdiction over the Catalina route. The facts are not in dispute. Appellees presented to the District Court only questions of law under the Constitution and statutes of the United States. Therefore, there was no advantage to be gained in this type of problem in utilizing the expertness of the State body. This is not, for example, a rate case in which the State Commission has special competence and skills. This is nothing more than deciding pure legal questions and judicial relief should therefore not be withheld. See *Great Northern Ry. Co.* v. *Merchants' Elevator Co.*, 259 U. S. 285 (1922); see Note, *Administrative Action as a Prerequisite of Judicial Review*, 35 Col. L. Rev. 230, 233-234 (1935).

Members of the Commission would undoubtedly follow the advice of their counsel in deciding these legal questions. Their counsel has already advised the members of the Commission, and stands ready to advise them again, that the Commission has jurisdiction over the route (R. 200). All that remains is a formalized hearing to put an official stamp of approval on a decision which has already been reached. Under these circumstances, this Court has held that judicial relief is not premature. *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24 (1934). See also *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145 (C. A. 5, 1936), certiorari denied, 298 U. S. 688 (1936).

The "surprise" of Appellants expressed at page 33 of their Brief at the present position of the Civil Aeronautics Board is based upon a misconception of the issues here involved. Of course, the Civil Aeronautics Board has no objection to Appellees' taking this matter to the federal courts. Appellee United is, and for many years has been, operating completely within the sphere of the Board's administrative process. For the purposes of this case, there has been a total exhaustion of the federal adminis-

trative process—and continued, unchallenged federal regulation for over twelve years. Therefore, Appellants' contentions do not relate merely to the exhaustion of an administrative process, but rather introduce the question of how *many* administrative processes must be exhausted.

Of course, it is familiar doctrine that a plaintiff need not exhaust his judicial remedies, as contrasted with legislative or administrative remedies, before resorting to the federal courts. *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43 (1923); *Railroad and Warehouse Comm'n of Minnesota* v. *Duluth Street Ry.*, 273 U. S. 625 (1927); See also *Banton* v. *Belt Line Ry.*, 268 U. S. 413 (1925); cf. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 440-441 (1923); Lilienthal, *The Federal Courts and State Regulation of Public Utilities*, 43 Harv. L. Rev. 379 (1930), particularly pp. 385-402.

The Remedy Available in the California Courts Is Inadequate.

Careful analysis of the California remedies demonstrates that the law of California does not provide for judicial review under the circumstances of this case. In the first place, judicial review in the California courts is limited exclusively by Sec. 1756 of the California Public Utilities Code (Appellants' Brief, Appendix A, p. vi) to applications for "a writ of certiorari or review for the purpose of having the lawfulness of the original *order or decision* or of the *order or decision* on rehearing inquired into and determined." (Emphasis added.) However, as pointed out earlier in this Brief, Sec. 2107 of the Code provides penalties for a failure or neglect to "comply with any part or provision of any order, decision, decree, rule, *direction, demand or requirement* of the Commission." (Emphasis added.) Although penalties can thus be im-

posed for violations of a "direction, demand or require ment" of the Commission, there is no way under Cali fornia law to obtain judicial review of such a "direction demand or requirement." Therefore, it is apparent tha Appellees faced the risk of penalties without any oppor tunity to have the Commission's letters reviewed in th California courts.

Moreover, even if the Commission's letters are viewe as "orders," nevertheless Appellees could not obtain judi cial review in California. As far back as 1916, th California Supreme Court made it clear that the Stat Railroad Commission (now the Public Utilities Com mission) had no authority to conduct proceedings deal ing only with the extent of its jurisdiction, and tha a carrier could not appeal to the court from a Com mission order which dealt only with jurisdictional issue because such an order was merely intermediate an interlocutory. *Holabird* v. *Railroad Commission*, 171 Cal 791 (1916). See also *Producers Transportation Co.* v *Railroad Commission*, 176 Cal. 499 (1917). In short, th law of California is that United in this case could not hav secured judicial review of the Commission's direction t file its tariffs with the State Commission, and would hav had to await a final decision on the merits before goin to the California Supreme Court. *See* Wheat, *Practice an Procedure Before the Railroad Commission of California* 15 Cal. L. Rev. 444, 456 (1927). United could have se cured review by the California courts only *after* submittin to the jurisdiction of the Commission and only *after* filin its tariffs and justifying its rates before the Commissio Until then, any effort by United to seek review in the Cal ifornia courts would have been premature, for as th California Supreme Court said in the *Holabird* case:

> "There is nothing in Section 67, or in any othe part of the Public Utilities Act, which in any way in

dicates an intention by the legislature to enlarge the writ [of review] so as to authorize this court to intervene in the course of a proceeding before the rail-commission, stop the proceedings, and determine whether or not its intermediate rulings are within its powers. Neither does the act empower the commission to make general adjudications regarding the character of the several water corporations or persons using or disposing of water, or conducting other business enterprises, within the state, for the purpose of ascertaining whether or not they, or any of them, are public utilities within the meaning of the Public Utilities Act, and therefore, subject to the jurisdiction of the commission. No proceeding is authorized for the mere purpose of determining this question with respect to any person or corporation." 171 Cal. at 696.

Under these circumstances, it can hardly be argued that the California remedy is adequate or that it is "plain, speedy, and efficient." In order to secure review in the California Supreme Court—which is at best merely discretionary—United would have had to engage in a drawn-out, expensive litigation and would have had to justify its existing tariffs already established by the Civil Aeronautics Board. Once again, Appellees point to *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456 (1943), which in an analogous situation emphasizes that the carrier should not be put to heavy and unnecessary expense which would ultimately be borne by the consuming public.

The Recent Alabama and Utah Decisions.

Appellants rely heavily on two recent decisions of this Court, *Public Service Commission of Utah*, v. *Wycoff*, 344 U. S. 237 (1952), and *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341 (1951). In view of Appellants' marked emphasis of these two cases,

Appellees believe that both decisions should be discussed in some detail.

In the *Alabama* case, a railway company, pursuant to an Alabama statute, had requested that the State Commission authorize discontinuation of two passenger trains, both running only on an *intrastate* route in Alabama. 341 U. S. 342-343. The company's request, advanced on the ground that the public need for the service no longer justified the financial loss which their operation occasioned, was denied by the Commission. The company then went to a three-judge District Court which invalidated the Commission's order and enjoined enforcement of it. This Court reversed on the ground that the District Court should have declined to exercise its jurisdiction, thereby leaving the parties to test the validity of the order in the State courts.

The *Alabama* case is vastly different from the problems presented in this proceeding. There, the carrier had itself initiated the State proceeding and turned to the federal courts only after losing before the Commission, despite the fact that "[s]tatutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code." 341 U. S. at 348. There, the transportation involved was exclusively *intrastate* and the issues involved only "predominantly local factors." 341 U. S. at 349. There, no national issues concerning the jurisdiction of a Federal agency were presented. On the contrary, *this* case involves a clash initiated by the State—not the carrier—between Federal and State authority over an important segment of commerce that has been subject to exclusive and unchallenged federal regulation for over 12 years. Here the federal agency considers the federal problem of sufficient importance to actively intervene in the litigation. Here, the issues do not in-

volve "predominantly local factors"—the issues in this case are of pressing concern to federal authority under a federal statute.

The *Utah* case is similarly inapposite. The *Utah* case was an action brought by a motor carrier in a District Court seeking a purely abstract declaration that its carriage of goods between points within as well as without Utah was all in interstate commerce. The carrier offered no evidence whatever to establish any past, pending, or threatened action by the Utah Commission touching its business in any respect, and the District Court made a general finding that no such interference had been made or threatened. 344 U. S. at 240. The carrier did not attack the constitutionality of any State statute, nor did it urge that an injunction be granted "outside of the naked recitation in the prayer of the complaint." 344 U. S. at 240.

Therefore, the *Utah* case dealt only with the propriety of awarding declaratory relief. This Court decided that the carrier had not made out a case for such relief because "the dispute has not matured to a point where we can see what, if any, concrete controversy will develop." This Court further pointed out that declaratory relief would not serve any "useful purpose" in the future. 344 U. S. at 245, 246.

The differences between *Utah* and the instant case are starkly apparent. Here, proof was introduced and a finding was made of threatened and impending injury. Here, a State statute was attacked as being unconstitutional, and the request for an injunction was vigorously pressed. Here, the dispute was live and concrete, with no uncertainty as to the claims of either side. Here, the State Commission had specifically directed the carrier to take definite action. Here, the injunctive and declaratory relief served an ex-

ceedingly useful purpose by ending an important jurisdictional dispute between a State and Federal agency. Unlike the *Utah* case, here there is nothing "nebulous or contingent" about the controversy, which more than satisfies all the *Utah* tests because it had already taken on "fixed and final shape" so that the court "can see what legal issues it is deciding, what effect its decision will have on the adversaries and [that] some useful purpose [will] be achieved in deciding them." 344 U. S. at 244.

It is true, as Appellants point ont, that the majority opinion in the *Utah* case states:

> "* * * Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim." (344 U. S. 237, 248.)

But how does this doubt apply to this case? Here the character of the threatened action itself concerns federal questions under the Commerce Clause, the Fourteenth Amendment and the Civil Aeronautics Act. This is made clear in the Commission's December 27th letter in which the Commission itself concluded that it had jurisdiction only after analyzing the provisions of the Civil Aeronautics Act and the meaning of "interstate or foreign commerce in the general sense or in the Constitutional sense." (R. 44.) Therefore, the character of the threatened action itself involves claims under federal law, or at least involves claims so interwoven and intermingled with federal law as to be inseparable.

Furthermore, the Civil Aeronautics Board does not

habitually rush to the defense of air carriers in disputes with State agencies. The Board does so only when important federal questions are presented of interest to the national concern with interstate air transportation. Realistically viewed, the controversy here is not between the State Commission and the air carriers—the fight is between the State Commission and the Civil Aeronautics Board with the air carriers caught in the middle. Here again, therefore, is another demonstration of the inapplicability of the *Utah* case. Like the other authorities relied upon by Appellants, discussed in other parts of this Brief, the holding of the *Utah* case has only superficial relevance which cannot withstand close analysis when contrasted with the problems presented by this case.[8]

The Johnson Act.

Appellants also contend that the District Court should not have awarded injunctive relief in view of the Johnson Act, 28 U. S. C. 1342. This contention is patently frivolous because of the express language of the Johnson Act itself, which provides that:

> "The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate making body of a State political subdivision, where:
>
> "(1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal constitution; and,
>
> "(2) the order does not interfere with interstate commerce; and,
>
> "(3) the order has been made after reasonable notice and hearing; and,
>
> "(4) a plain, speedy and efficient remedy may be had in the courts of such state."

8. For a more detailed discussion of the distinctions between the *Utah* case and this case, see Plaintiffs' Answer to Defendants' Motion for New Trial, R. 91-104.

Appellees have demonstrated earlier in this brief that: (1) jurisdiction is not based *solely* on diversity of citizenship or repugnance of the order to the Federal constitution; (2) the Commission's action *does* interfere with interstate commerce; (3) the directive was *not* made after reasonable notice and hearing; and (4) a plain, speedy and efficient remedy is *not* available in the courts of the State of California. Therefore, not a single requirement of the Johnson Act is not in this case.

C. The Decision Below Is Consistent with the Preservation of a Proper Federal-State Relationship.

Underlying all of Appellants' jurisdictional contentions is the basic problem of maintaining harmonious relations between State and Federal authority and preserving the rightful independence of State government. A practical and realistic analysis of the decision below demonstrates that the District Court's action in no sense upsets the delicate balance required in our federal system. On the contrary, the District Court's decision eliminated incipient discord by promptly and expeditiously defining the boundaries of Federal and State authority.

Appellants' arguments misconceive the jurisdictional issue by asserting that federal jurisdiction does not exist in this suit. Entirely apart from Appellees' constitutional claims that the California penalty statute, if applicable, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, there were additional constitutional claims presented by Appellees' allegation that the State's directives to United unreasonably burdened interstate commerce and obstructed Congressional use of its constitutional power to regulate interstate and foreign commerce. Moreover, even aside from these constitutional claims, federal jurisdiction plainly existed under Sections

1331 and 1337 of Title 28 of the U. S. Code. Section 1331 provides:

> "The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and arises under the constitution, laws or treaties of the United States."

Section 1337 provides:

> "The District Courts shall have original jurisdiction of any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

Indeed, this case abounds with federal questions concerning the Appellees' rights under the Federal Constitution and the meaning of a major federal statute. The real question is not whether federal jurisdiction exists, but whether the court below, in the exercise of its sound discretion, should have declined to exercise its jurisdiction.

Appellees recognize that there are certain areas in which the doctrine of equitable abstention has properly motivated federal courts not to decide a case concerning certain state matters. For example, where a state court's ruling on an uninterpreted state statute or an undecided question of state law might enable the federal courts to avoid passing upon an important constitutional question, the federal court should avoid decision. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496 (1941). In addition, a federal court should refrain from deciding a case which involves a specialized aspect of a technical complicated system of local law outside the normal competence of a federal court, *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 332 (1943). As discussed earlier in this Brief, a federal court should stay its hand in a case involving exclusively intrastate operations and predominantly local factors where a carrier had

itself initiated a state proceeding but failed to take the statutory appeal which was an integral part of the regulatory process under state law. *Alabama Commission* v. *Southern Railway Co.*, 341 U. S. 341, 348-349 (1951). And, a federal court should not award declaratory relief in a suit involving only abstract questions without an actual controversy between the parties. *Public Service Commission of Utah* v. *Wycoff*, 344 U. S. 237 (1952).

But none of the considerations underlying the doctrine of equitable abstention present in *Pullman, Burford, Alabama,* and *Wycoff,* are involved in this case. There are no questions concerning a specialized field of state law with which federal judges are not familiar. There is no need for administrative expertise to solve this dispute. There are no unresolved questions of State law. Here, the transportation is interstate, and there are no predominantly local factors which are of major importance. Here, the controversy is live and active. In this situation, there are no exceptional circumstances present to deter a federal court from exercising its power of decision. There should be no self-imposed judicial barrier in this type of controversy to granting the swift remedies accorded by Congress.

Most important of all, this case turns on the meaning and construction of a federal statute and its application to interstate and foreign commerce. Federal courts are uniquely equipped to decide national issues involving the construction of a federal statute. Here, the very issue which the court below regarded as decisive concerned the interpretation of an Act of Congress vesting exclusive jurisdiction in a federal regulatory agency. This is precisely the type of claim which the federal courts should be constantly alert to evaluate and protect. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947); *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148 (1942); *Mayo* v. *United States*,

U. S. 441 (1943); *First Iowa Hydro-Electric Coopera-*
v. *F. P. C.*, 328 U. S. 152 (1946); *Napier* v. *Atlantic*
t Line R. Co., 272 U. S. 605 (1926); *Hines* v. *Davido-*
, 312 U. S. 52 (1941).

ut Appellants would have the District Court sit idly
when federal claims like this one are presented to it.
s doctrine would weaken rather than strengthen our
ral system. Here, federal regulation has gone un-
lenged by the State for over 12 years. To hold now
the federal courts are closed to Appellees' claim sim-
because the State, in "johnny come lately" fashion, has
ded to intermeddle in this route would reflect an over-
ning deference to State authority. This would reduce
previously unchallenged authority of the Civil Aero-
ics Board to a second-class status. Federal agencies
as the Civil Aeronautics Board should not have to
to the California Commission and California courts
in hand to vindicate their authority under federal
over interstate air transportation whenever the State
ncy sees fit to challenge it. This is much more than
scrupulous regard for the rightful independence of
e governments which should at all times actuate
federal courts * * * ." *Matthews* v. *Rodgers*,
U. S. 521, 525 (1932). This would be a scrupulous dis-
ard for the rightful independence of previously un-
llenged federal authority which is unquestionably enti-
to the consideration of the federal courts.

he present aggressiveness of Appellants is in marked
rast to their previous years of passivity—particularly
939, 1941 and 1946—when certificates of Public Con-
ience and Necessity were granted or renewed to Appel-
by the Civil Aeronautics Board. Prior to the issuance
hose certificates, Appellants might have filed a protest
nemorandum of opposition as an "interested person".

49 U. S. C. 481(c). Furthermore, the rules of the Civil Aeronautics Board specifically provide for the appearance of state agencies at hearings before the Board (Section 302.14).[9] In addition to appearing before the Civil Aeronautics Board at the times when the issuance of certificates to Appellees were being considered, Section 703[10] of the California Public Utilities Code permits Appellants to apply for relief to any court of competent jurisdiction when, in the opinion of Appellants, existing or proposed "interstate rates, fares, tolls, charges, and classification" are in violation of any act of Congress. Despite the availability through the years of these courses of action, Appellants chose to sleep on the rights they now proclaim so strenuously. In a case like the present where judicial discretion has such wide play, the fact of Appellants' somnolence should have special significance.

This case boils down to determining whether the California Public Utilities Commission has authority to compel United to file its tariffs with that Commission. An air carrier cannot serve two masters. It is subject to either

9. "Any person, including any state, political division thereof, state aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the Examiner or the Board, if the hearing is held by the Board, such person may also cross-examine witnesses directly." Pike & Fischer, Administrative Law, 2d Series. Agency Rules, C. A. B. 4, 5.

10. 703. "The commission may investigate all existing or proposed interstate rates, fares, tolls, charges, and classifications, and all rules and practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages or conversations where any act in relation thereto takes place within this State and when they are, in the opinion of the commission, excessive or discriminatory or in violation of the Interstate Commerce Act, or any other act of Congress, or in conflict with the rulings, orders, or regulations of the Interstate Commerce Commission, the commission may apply for relief by petition or otherwise to the Interstate Commerce Commission or to any court of competent jurisdiction. (Former Sec. 34)"

deral or state regulation, not both. If the Commission s no jurisdiction over the Catalina tariffs, it would fol- w that United would be required to pursue administrative medies set up in a tribunal which has no legal authority er United. United should not be compelled to submit the Commission if that Commission has no jurisdiction. is no answer to suggest that by a circuitous and ex- nsive proceeding, United might ultimately obtain by rtiorari a ruling from the California Supreme Court as the jurisdiction of the State Commission, and then ssible review in this Court. If this is demanded in this pe of controversy, the result will not be the exhaustion administrative remedies, but rather the exhaustion of igants.

I. TRANSPORTATION BETWEEN CATALINA ISLAND AND THE MAINLAND OF CALIFORNIA GOES THROUGH THE AIR SPACE OVER A PLACE OUTSIDE THE STATE OF CALIFORNIA AND HENCE IS "INTERSTATE AIR TRANSPORTATION" WITHIN THE MEANING OF THE CIVIL AERONAUTICS ACT.[11]

The Area Between Catalina Island and the Mainland of California, Except That Portion Within the Three-Mile Marginal Belts Along the Mainland Coast and Around the Island, Is a Place Outside the Boundaries of California.

This matter is one involved in a proceeding now pending this Court to determine the precise seaward boundaries California, *United States* v. *California*, No. 6, Original. lifornia and the United States have filed exceptions

11. "Interstate air transportation" is defined in the Act as the arriage by aircraft of persons or property as a common carrier compensation or hire or the carriage of mail by aircraft, in mmerce * * * between places in the same State of the United ates through the air space over any place outside thereof * * *." U. S. C. 401 (21).

to the report of a Special Master. The hearing before the master was preceded by the decision of this Court in *United States* v. *California*, No. 12, Original, 332 U. S. 19 (1947), wherein it was held that the Federal Government had the paramount right in and power over the belt of land extending three miles seaward from the ordinary low water mark on the coast of California; however, neither the opinion of the Court nor the decree thereafter entered precisely defined the baseline from which the seaward measurement should begin. In *United States* v. *California*, No. 6, Original, the Special Master rejected the claim of California, urged again here, that the boundary of the state extends three miles seaward of lines drawn along the western side of the outermost off-shore islands and includes as inland waters the ocean between the mainland and the outermost off-shore islands. The Special Master found that the rule stated by the Secretary of State in a letter to the Attorney General, dated November 13, 1951, "is and has traditionally been the position of the United States in international relations • • •". *United States* v. *California*, No. 6, Original Report of Special Master (under Order 2, December 3, 1951), p. 27. The mentioned letter said: "Each island, as defined, was to be surrounded by its own belt of territorial waters measured in the same manner as in the case of the mainland." (p. 171, Brief of United States Before The Special Master, *United States* v. *California*, No. 6, Original.)

The Brief filed by the United States in *United States* v. *California*, No. 6, Original, sets forth in an able and exhaustive manner authorities to support the view that—apart from the marginal waters off the mainland and around Catalina—the waters between the mainland and the island are outside the borders of California. In addition, the Brief of Appellee Civil Aeronautics Board in this case

very adequately treats the issues on the merits. Duplication or reiteration of those efforts does not seem appropriate. However, the view of Appellees will nevertheless be briefly stated.

B. The Applicable Rule of International Law.

It is a general proposition of international law that nations are entitled to exercise territorial sovereignty over waters within a marine or nautical league (three miles) from their boundaries. 1, Moore, *International Law Digest*, p. 698. Here, of course, the question is whether the boundary of California sweeps westward from the mainland to include offshore islands or whether such islands must be considered to have their own boundaries.

The *Anglo-Norwegian Fisheries* case (Judgment of Dec. 18, 1951, I. C. J. Reports 1951, p. 116), is regarded by both Appellants and Appellees as an authoritative precedent with respect to the principles of international law involved. There the International Court of Justice was faced with a claim by Great Britain that the "base lines" (or boundaries from which territorial seas are measured) adopted by Norway along its North Sea approaches were unjustified. The nature of the coastal region in question was described by the court:

> "• • • the large and small islands, mountainous in character; the islets, rocks and reefs, some always above water, others emerging only at low tide are in truth but an extension of the Norwegian mainland. The number of insular formations, large and small which make up the *skjaergaard* (literally, rock rampart) is estimated by the Norwegian government to be one hundred and twenty thousand." (p. 124.)

The court said the *skjaergaard* constituted "a whole" with the mainland. (p. 128.) It was noted that the coastal area of Norway, unlike that of nearly all other countries, did not constitute a clear dividing line between land and sea.

Both sides were agreed that Norway was entitled on historical grounds to claim either as internal or territorial waters the area of water lying between the island fringe and the mainland. (p. 130.) The dispute was over the manner of drawing the baseline along the *skjaergaard*.

In the *Fisheries* case Norway disclaimed any intention to urge any new rules on the court:

> "[The] Norwegian Government does not only rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny; it invokes history, together with other factors, to justify the way in which it applies the general law." (p. 133.)

The general nature of the problem before it was described by the court as follows:

> "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the determination with regard to other states depends upon international law." (p. 132.)

The court pointed out that although a state must be allowed to adapt its base lines to practical needs and local requirements, they must not depart from the general direction of the coastline. (p. 133.) The "real question" raised in the choice of base lines was said to be whether the sea areas lying within them are sufficiently closely linked to the land domain to be subject to the regime of internal waters; this test should be "liberally applied in the case of a coast which is as unusual as that of Norway." (p. 133.)

The Court concluded that: (1) the Norwegian system of drawing its base lines was imposed by the peculiar geography of the Norwegian coast; (2) it had been con-

solidated by a constant and long practice since at least 1869; (3) the method was tolerated by other nations, including Great Britain, for sixty-nine years; and, (4) because of the foregoing, it was not contrary to international law.

C. The California Coast Line.

Before Appellants may look to the decision of the *Fisheries* case for support of their present claims, their first problem would appear to be one of showing a relationship between the California coast line and insular formations and those claims. Certainly there is nothing so unique about the California geography as to impose the system now being sought. The nature of California's coast line, including offshore islands, is, of course, a matter for judicial notice. *Jones* v. *United States*, 137 U. S. 202 (1890); *United States* v. *Carrillo*, 13 F. Supp. 121 (D. C. S. D. Cal. 1935).

D. California Cannot Act for the United States in Extending National Boundaries in the Marginal Seas.

Obviously the position taken by the United States with respect to its marginal seas is a matter of international concern. (See the Tidelands cases: *United States* v. *California*, 332 U. S. 19 (1947); *United States* v. *Louisiana*, 339 U. S. 699 (1950); *United States* v. *Texas*, 339 U. S. 707 (1950).) Although the United States might rely on action by one of the states in asserting the external power exclusively reserved to the Federal Government, with respect to foreign relations generally, the State of California has no standing. *United States* v. *Belmont*, 301 U. S. 324 (1937).

Manchester v. *Massachusetts*, 139 U. S. 240 (1891), relied on by California in this connection, states at page 264: "Within what are generally recognized as the territorial

limits of states by the law of nations, a State can define its boundaries on the sea and the boundaries of its countries." Disputed there was a claim of jurisdiction by Massachusetts over "Buzzards Bay". However, the question here is what are the territorial limits of the United States that have been generally recognized by the law of nations. In *Manchester* v. *Massachusetts, supra*, it was pointed out that bays wholly within the territory of a nation, the headlands of which are not more than two marine leagues apart, have *always* been regarded as a part of the territory of the nation in which they lie. 139 U. S. at 257. The headlands of Buzzards Bay were less than two marine leagues wide. Hence by operation of the general rule, the enclosed bay was a part of the territory of the United States. This case then was merely an early judicial recognition of the principle which was the subject of the Submerged Lands Act (California Brief, Appendix A. pp. xvii, xviii) and is of no help to California here.

E. Relevant Expressions of the Position of the United States by the Executive Department.

While Secretary of State, Mr. Jefferson wrote a letter to the British Minister in 1793 advising that the President had instructed officers under his authority to exercise the territorial protection of the United States to the distance of "one sea league or three geographical miles from the seashores." (1, Moore, *Digest of International Law*, p. 702; pp. 55-60 Brief of United States Before the Special Master, *United States* v. *California, supra.*)

A firm position with respect to offshore islands is stated in a letter from Secretary of State Bayard to Secretary of the Treasury Manning dated May 28, 1886. Secretary Bayard said that the territorial authority of the United States must "follow closely, at a distance of three miles, the

boundary of the shore of the continent *or of adjacent islands* * * *." (Emphasis added.) 1, Moore, *Digest of International Law*, p. 721. This same position was taken by the United States at the Hague Conference in 1930. (Acts of Conference, p. 200.) The view of the Secretary of State in 1951 has already been mentioned above.

It is claimed by California that the position assumed by the United States in the Alaska Boundary Arbitration that the relevant coast line for boundary purposes is the "political coast line" which treats all off-lying islands as part of the mainland (14 Alaska Boundary Arbitration 31), when construed with the *Fisheries* decision, supports their present claim that the waters between Catalina and the mainland are within the boundaries of California. That argument fails to take into account either the similarity of the Alaskan Archipelago to the coast of Norway or the rationale of the decision in the *Fisheries* case. It would be perfectly consistent with that decision for the United States to adopt a different practice for coast lines with diverse characteristics.

The arrangements between England and Spain in 1790 (see Appellants' Brief, p. 98) with respect to fishing off the coast of what is now California are of no more relevance here than arrangements between the early Spanish settlers and Indian tribes or those between the Indian tribes themselves; what is important is the claim the United States has asserted or is asserting.

F. Recognition of the Position of the United States by Federal and California Courts.

In 1915, the United States Supreme Court declared that in traveling from the mainland of California to Santa Catalina Island vessels "must traverse the high seas for upwards of twenty miles." *Wilmington Transp. Company*

v. *California RR. Commission*, 236 U. S. 151, 152 (1915). Below, the California Supreme Court had recognized that a portion of the voyage was on the "high seas". 166 Cal. 741 (1913).

After considering, among other things, the letter of Secretary of State Bayard to Manning cited *supra*, a California appellate court settled a dispute as to whether there was *any* marginal belt around Catalina Island. Since the California Constitution (see Appellants' Brief, Appendix A, p. ii) did not preclude the possibility of such a belt, and laws in derogation of sovereignty are to be construed strictly in favor of the state, it was assumed that the "general rule" applied. Application of the "general rule" resulted in a declaration that the sovereignty and jurisdiction of California extended over a belt of water three miles wide circling the island. *In re Marincovich*, 45 Cal. App. 474 (1920). Also in 1920, another California appellate court independently determined without extended discussion that there was no reason for making Catalina Island an *exception to the rule* that the state jurisdiction extends three miles from the coast line. *Sutton* v. *Peckham*, 48 Cal. App. 88 (1920).

Other decisions have utilized what has been called the "headlands theory" to extend the jurisdiction of California three miles seaward of lines drawn across the headlands of San Pedro and Santa Monica bays. *People* v. *Stralla*, 96 P. 2d 941 (1939); *United States* v. *Carrillo*, 13 F. Supp. 121 (D. C. S. D. Cal. 1935). Recourse to this doctrine would not have been necessary if it had been considered that offshore islands did not have their own three mile belt but were embraced within a baseline sweeping seaward from the mainland shore around the outermost islands.

California points out that the State of California had

presented an alternative argument in *People* v. *Stralla*, *supra*, that "by the very words of the Constitution the islands are included within the boundary" and that "by including the island within the boundary the water lying easterly of the islands is necessarily within the boundary." (Appellants' Brief, pp. 50-51.) This argument, it is said, was adopted by the United States when the United States Attorney who appeared adopted the California Brief. It does not seem reasonable to derive from this alternative argument, not adopted by the California court, an assertion of jurisdiction by California over the waters now in question. Nor can the position of the United States Attorney, when viewed in the context of his request for permission to appear, and the consent of the Attorney General, be considered to be anything so startling as adoption by the United States of the view now advocated by California. (See the letter dated April 19, 1939 to the Attorney General, Washington, D. C. from the United States Attorney, Southern District of California, Los Angeles and the reply thereto set out in the Appendix to the Reply Brief of the United States in *United States* v. *California*, No. 6, Original at pp. 84-86.)

It is further argued by California that the holding of the court in *People* v. *Stralla* demonstrated a wish "to preserve California's jurisdiction beyond the area in dispute." (Appellants' Brief, p. 51.) This conclusion is based upon the statement in the opinion that California's jurisdiction extends *at least* three miles oceanward of a line drawn across the headlands of the particular bay. It is believed that the mere statement of this argument and the basis for it constitutes a sufficient refutation. If there had been any existent California jurisdiction beyond the area in dispute the court would surely have acknowledged it. Such careful hedging by a cautious jurist can hardly support the bold claims now asserted.

Examination of an early California case relied on by Appellants (Brief, p. 49) will demonstrate how that reliance has been misplaced. In *Ex Parte Keil*, 85 Cal. 309 (1890), the issue before the court in a habeas corpus proceeding was whether the California kidnapping law applied to the deeds of the petitioner. He had brought by force of arms certain sailors from the mainland to Catalina Island. An element of the offense of kidnapping was a design to take a person out of the state. The court noted the following contentions which were obviously pressed by the State: the waters of the ocean at all points more than a marine league from the shore are out of the state; consequently, in conveying the sailors from the mainland to the island the petitioner took them, and necessarily intended to take them, out of the state. It was said that this represented "a nice and imporant question as to which the court is not agreed, and as its decision is not essential to a disposition of this case, it will be left for future consideration." 85 Cal. at 312. The decision was ultimately bottomed on the theory that the design shown was not a design to take a person out of the state in the sense of the statute. Two judges concurring in the result were of the opinion that "a design to take a person across that part of the Pacific Ocean which lies between the mainland and the island of Santa Catalina is 'a design to take him out of this State' within the meaning of that part of the Penal Code which defines kidnapping." 85 Cal. at 313.

California maintains that *Ex Parte Keil* shows that the five judges who concurred in the majority opinion believed the waters between Santa Catalina Island and the California mainland were within the State of California. The case itself, however, is at most an unreliable basis for the proposition that certain of the judges concurring in the majority opinion may have had private leanings toward that view. On the other hand, the legal representatives

of the State arguing the case and two judges clearly characterized those waters as high seas beyond the boundaries of California.

G. Neither the Approval of California's Constitution Upon Its Joining the Union Nor Passage of the Submerged Lands Act Indicated a Change in the Position of the United States.

The acceptance of the California Constitution by the United States upon its admission to the Union cannot reasonably be construed as a Federal assertion or recognition that the boundary of California runs outside the outermost offshore islands, rather than around such islands individually. The words of the particular article of the California Constitution as adopted and amended obviously repel any such assumption. As was demonstrated in the discussion of *In Re Marincovich, supra,* the choice presented to an interpreter of the pertinent article is not whether the California boundary or base line sweeps seaward to include offshore islands, but rather whether such offshore islands can be said to have the three-mile belt specifically provided for the mainland shore.

The recent enactment of the Submerged Lands Act (See Appellants' Brief, Appendix A, pp. xvii, xviii) did not approve the attempts by California in 1949 to redefine her boundaries. Neither did any previous congressional enactments; nor have any since. That Act did not purport to define the "coast line" from which "Any State admitted subsequent to the formation of the Union * * * may extend its seaward boundaries * * *." Since the issue here concerns the location of California's "coast line," that Act does not affect the question in this case.

H. The View Now Urged by California Is Inconsistent with the Traditional Advocacy of Freedom of the Seas by the United States and Would Not Contribute to the Security of the United States.

Authorities need not be arrayed to support the proposition that the United States has traditionally striven for "freedom of the seas." (See *United States* v. *California*, 332 U. S. 19, 34 (1946).) The restrictions which California urges would clearly limit such freedom by United States vessels as other nations reciprocated. Furthermore, in a letter dated April 25, 1952, from the Department of the Navy on behalf of the Department of Defense to the Honorable Emanuel Celler, Chairman, Committee of the Judiciary, House of Representatives (See Appendix to Reply Brief of United States, *United States* v. *California*, No. 6 Original, pp. 80-84) a position directly contrary to that of Appellants was forcefully stated. The House Committee was considering a joint resolution seeking to accomplish for all the United States what Appellants now seek for themselves. The letter said in part:

> "The United States has always been one of the World's foremost advocates of the doctrine of the freedom of the seas and has vigorously opposed all efforts to restrict the free navigation of its war vessels and merchantmen. *The concept of the freedom of the seas likewise applies to the freedom of the air spaces above the seas.* Because of this, and other reasons, the United States Government, including the Department of the Navy, has always advocated the three-mile limit of territorial waters delimited in such a way that the outer limits thereof closely follow the sinuosities of the coast line. Sovereign claims to waters of the high seas restrict the range of war vessels and merchantmen. By reducing sovereign claims to the narrow three-mile belt, the range of these vessels is thereby expanded. The time honored position of the Navy is that the greater the freedom and range of its

warships and aircraft, the better protected are the security interests of the United States because greater utilization can be made of warships and military aircraft. In the event that there are certain sensitive points requiring larger areas of the sea to be under United States control for security purposes there are available the devices of Defensive Sea Areas and Maritime Control Areas which are well recognized in international law. These devices have been widely used by the United States in the past and are being used even at the present time." (Emphasis added.)

IV. BY THE PROVISIONS OF THE CIVIL AERONAUTICS ACT AND THE BOARD'S ACTION THEREUNDER THE UNITED STATES HAS ASSUMED EXCLUSIVE JURISDICTION OVER THE APPELLEES' OPERATIONS BETWEEN THE MAINLAND OF CALIFORNIA AND SANTA CATALINA ISLAND.

A. The Plain Meaning of the Statute, Its Legislative History and Obvious Purposes Bring This Transportation Under the Exclusive Control of the Civil Aeronautics Board.

As Appellees have shown, it is plain that the major portion of the waters between Santa Catalina Island and the mainland of California are outside the boundaries of California. Thus this transportation falls squarely within the definition of "interstate air transportation" in the Civil Aeronautics Act, subject to federal regulation, since such transportation is "between places in the same state of the United States through the air space over any place outside thereof". 49 U. S. C. 401 (21) (a). Efforts to evade the plain meaning of this language are necessarily examples of "what proposes to be mere rendering becom[ing] creation and attempted interpretation of legislation becom[ing] legislation itself." *Palmer* v. *Massachusetts*, 308 U. S. 79, 83 (1939.)

In *Lichten* v. *Eastern Air Lines,* 189 F. 2d 939, 941, (C. A. 2, 1951) the court commented on the obvious purpose of Congress in enacting the Civil Aeronautics Act:

> "A primary purpose of the Civil Aeronautics Act is to assure uniformity of rates and services to all persons using the facilities of air carriers. Civil Aeronautics Act §§ 404(a), 902(a), 49 USCA §§ 448(a), 622(a). To achieve this, it is essential, in the judgment of Congress that a single agency, rather than numerous courts under diverse laws, have primary responsibility for supervising rates and services. *Adams Express Co.* v. *Croninge,* 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314; *Mack* v. *Eastern Air Lines, Inc., supra* [87 F. Supp. 113.]"

It is true that Congress has included this transportation within its definition of "interstate air transportation" although it is acting under its constitutional power to regulate "foreign commerce." *Lord* v. *Steamship Co.,* 102 U. S. 541 (1880); *Local 36 of International Fishermen, et al.* v. *United States,* 177 F. 2d 320 (C. A. 9, 1949); *Manaka* v. *Monterey Sardine Industries,* 41 F. Supp. 531 (D. C. N. D. Cal., 1941.) However, this fact has no legal significance since statutory definitions customarily control the meaning of statutory words. *Lawson* v. *Suwannee Fruit and S. S. Co.,* 336 U. S. 198, 201 (1949).

The legislative history of the Civil Aeronautics Act plainly shows that when Congress said "through the air space over any place outside thereof," it did not mean, "through the air space over any other state" as is contended by California. An early bill designed to regulate air transportation contained the phrase "between places in the same state through another state." S. 3027, 74th Cong., 1st Sess. 1935. In the course of the hearings on this bill Mr. Eastman, then Federal Coordinator of Transportation, suggested that it be replaced by the phrase which is now contained in the statute. As Appellants have

pointed out (Brief, pp. 63-64), when the suggestion was made it was explicitly recognized that the change would include transportation between points in the same state over a foreign country or the high seas as well as over another state. As Mr. Eastman stated, the same need existed for regulation in each case. Clearly, the "need" was for federal regulation. Appellants, not questioning Congress' constitutional power to regulate, argue that there was no need for federal regulation of transportation such as that here involved because in the absence of such regulation the states might act. The short answer is that Congress chose to act and the wisdom of such action is not open to question by the Public Utilities Commission of California.

It may also be noted that when Congress intends to deal only with transportation between places in the same state but through another state it knows how to say so. (Interstate Commerce Act, Part II, Motor Carriers, 49 U. S. C. 303(a)(10).) And, when Congress wishes to exempt interstate or foreign transportation having unique local characteristics from the operation of a law it again knows how to do so. (49 U. S. C. 303(b) (8).)

It is said by Appellants that a literal reading of the definition of "interstate air transportation" will lead to absurd results. (Brief, p. 61.) The example given (flying three miles out to sea to avoid state regulation of an otherwise intrastate route) fails to indicate the reason for the overseas segment of the flight. If it was a scheduled flight along a "civil airway" (49 U. S. C. 401 (16), 452), then it should be classified as "interstate air transportation" within the meaning of the Civil Aeronautics Act and would be subject to the jurisdiction of the Civil Aeronautics Board. This ill considered example adds nothing to the arguments of California. It is far removed from the present dispute which does not involve an attempt by

United to avoid regulation by an unusual flight pattern but rather the plight of a carrier that is subject to the conflicting claims of two regulatory bodies.

Apart from the plain language of the Act and the apparent Congressional purposes, a brief glance at the scope of the federal regulations will show that there is no room here for state action. *Public Utilities Comm. of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456 (1943.)

Tariffs for interstate air transportation must be filed with the Civil Aeronautics Board and observed by air carriers (49 U. S. C. 483), and the rates and charges contained therein may be fixed by the Board. (49 U. S. C. 642 (d).) Practices in connection with such transportation may be prescribed by the Board (49 U. S. C. 484, 491, 642), and operations may be instituted, suspended, or terminated only by leave of the Board. (49 U. S. C. 481 (a), (k).) Accounts and records must be maintained in accordance with standards prescribed by the Board. (49 U. S. C. 487.) Whether or not a particular carrier is rendering adequate interstate service, and what measure of service may be regarded as adequate, likewise are questions committed to the competence of the Board. (49 U. S. C. 484, 642.) Contracts between carriers affecting interstate air transportation, must be filed with the Board for its approval or disapproval. (49 U. S. C. 492.) Intercorporate relationships likewise are subjected to Board scrutiny and control. (49 U. S. C. 488, 499.)[12]

There can thus be no doubt that the Civil Aeronautics Act imposes complete and comprehensive regulation upon all phases of interstate air transportation. In clashes of State *vs.* Federal regulatory control of this nature, this Court has announced the following rule of law:

12. The very broad sweep of the Civil Aeronautics Act also serves to justify the scope of the judgment entered by the District Court. (See Appellants' Brief, p. 38.)

"The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, at 236 (1947.)

Appellants' contention that California may regulate this route must give way by virtue of the Supremacy Clause. U. S. Const., Art. VI, Cl. 2.

B. Appellants' Contention That Congress Did Not Intend to Regulate the Subject Transportation, Even If Not Intrastate, Is Insupportable.

Appellants argue that even if this transportation is something other than intrastate commerce, it is not the type of commerce covered by the Civil Aeronautics Act. (Brief p. 60.) In the first place this view is in direct conflict with the plain language of the statute. However, the cases and arguments of Appellants will be individually discussed.

The *Yellow Cab* cases cited by Appellants lend no support to their attempt to read confusion into the specific language of the Civil Aeronautics Act. In the first *Yellow Cab* case this Court held that the very general language of the Sherman Anti Trust Act could not have been intended to apply to *"local taxicabs* which merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent *local service"*. Such service was *"not an integral part of interstate transportation."* And, this Court said that "a restraint on or monopoly of that *general local service"* was not proscribed by the Sherman Act. *United States* v. *Yellow Cab Company*, 332 U. S. 218, 233 (1947). (Emphasis added.)

In the *Yellow Cab* case there was an attempt to bring a

federal statute to bear by inference upon an admittedly local activity. It can hardly be support for an attempt to upset by strained construction express federal regulation of an activity in foreign commerce.

It is said by Appellants (Brief p. 61) that there is a presumption here that the federal authority has not superseded that of the state because, if it did, the result would be a blow to the "delicate balance between Federal and State jurisdictions upon which our Federal government is based". It is, of course, recognized by Appellants that where the intent of Congress is clear the state authority will be superseded. That is this case.

Assuming that this case is one that involves "the delicate balance between our Federal and State jurisdictions", Appellants gather authorities behind their contentions that: (1) it must clearly appear that the Federal invasion of state authority is necessary; and, (2) nothing must be left to inference or presumption. The cases relied on all deal with situations where presumptions had to be indulged to bring *intrastate* activities under federal control. In *Palmer* v. *Massachusetts*, 308 U. S. 79, 84 (1939), this Court said it has "disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress". This Court was acting with "proper regard" for the "rightful concern of local interests in the management of local transportation" in restricting application of federal power only to those cases where the statutory authority "affirmatively appears" in *Yonkers* v. *United States*, 320 U. S. 685, 691 (1944). *North Carolina* v. *United States* 325 U. S. 507, 510 (1945) presented the question of whether the indispensable prerequisites to the exercise of the federal power over intrastate rates had been shown to exist with sufficient certainty. And, in *Arkansas R. R. Commission* v. *Chicago*

Rock Island & Pac. R. R. Co., 274 U. S. 597, 603 (1927) this Court said that where "there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power". The case of *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144 (1944) resolved the question of whether a California public warehouse fell within the exemptions afforded a "public utility" in the Emergency Price Control Act of 1944. "Public utility" had not been defined in the statute. This Court observed that a "traditionally local domain" was involved and found that Congress did not intend to supersede the power of a state regulatory commission exercising comprehensive control over the prices of a business appropriately classified as a utility. 321 U. S. at 154.

Examination of the above authorities relied on by Appellants reveals no basis for a conclusion that the courts will substitute their judgment for that of Congress as to the *necessity* for Federal regulation. It also demonstrates their irrelevance to this dispute. As Appellees have shown, this is not a case where an attempt is being made to expand by inference a general or doubtful federal statute or regulation in order to oust the state's power over an intrastate activity. Involved here is an attempt by a state to strike down Federal regulation of foreign commerce which has a clear statutory basis and which has been conducted continuously and without state protest for 12 years. "There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power." *Simpson* v. *Shepard*, 230 U. S. 352 at 399 (1913).

Feeling no compulsion to cite authority, Appellants state: "Certainly the waters between the mainland of California and Santa Catalina are within the jurisdictional boundaries of the State of California". (Brief p. 63.) Because the

term "State" as used in Section 1(21)(a) of the Civil Aeronautics Act need not be limited to the *territorial* boundaries of a state but may reasonably include its *jurisdictional* boundaries, it is argued that the route in question is not "outside" the State of California.

Appellees find no basis in the context of the present dispute for any distinction between the territorial and jurisdictional boundaries of states. Even if there were such a distinction, the discussion *supra* is clearly indicative of the fact that the route in question passes through a place beyond the jurisdiction of California. Finally, again assuming that the suggested territorial-jurisdictional boundary dichotomy is valid, it is clear from the statutory definition of "United States" in the Civil Aeronautics Act[13] that the interpretation of the word "State" suggested by Appellants is unwarranted.

Appellees can only wonder why Appellants saw fit to discuss the numerous instances in which attempts to extend Federal economic regulation to wholly intrastate operations of air carriers have been unsuccessful. (Brief p. 65.) Such a discussion might be relevant if assertions were being made that this transportation, although completely intrastate, was nevertheless subject to the Civil Aeronautics Act. However, no such claim is being made. Appellees simply contend that this transportation is "interstate air transportation" as defined in the Civil Aeronautics Act.

13. "'United States' means the several States • • • including the Territorial waters and the overlying air space thereof." 49 U. S. C. 401 (32.)

CONCLUSION.

For the reasons stated the judgment of the District Court should be affirmed.

Respectfully submitted,

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in width is high seas. This position of the State Department is amply supported by the precedents of international law and is not contrary to the decision of the International Court of Justice in the *Fisheries Case,* I. C. J. Reports, 1951, p. 116. The limitation on inland waters which was adopted by the district court in this case is in accord with the views of the Special Master in *United States* v. *California.*

The case of *Manchester* v. *Massachusetts,* 139 U. S. 240, is not authority for the proposition that a state may extend its boundaries beyond the territorial limits of the United States. There, inland waters of a bay, concededly within the territorial limits of the United States, were involved. Nor does a state have authority to speak for the United States in this field where foreign policy is of primary concern. *United States* v. *California,* 332 U. S. 19, 35; *United States* v. *Louisiana,* 339 U. S. 699; *United States* v. *Texas,* 339 U. S. 707, 719; *United States* v. *Belmont,* 301 U. S. 324, 331.

The provisions of the California Constitution fixing its boundaries, which were approved by Congress at the time California entered the Union, are not properly construed as bringing the water area here in question within the boundaries of California. Both state and federal cases have dealt with this area as high seas. *In re Marincovich,* 48 Cal. App. 474, 192 Pac. 156; *People* v. *Stralla,* 14 Cal. 2d 617, 96 P. 2d 941; *Wilmington Transportation Co.* v. *Railroad Commission*

of California, 166 Cal. 741, 137 Pac. 1153, affirmed, 236 U. S. 151.

II

By definition, the Civil Aeronautics Act extends to transportation "between places in the same State of the United States through the air space over any place outside thereof" (Section 1 (21) (a)). This clearly covers transportation between points in California when such transportation requires passage through the air space over the high seas. Not only is the statutory language unambiguous; the legislative history demonstrates that the words "any place outside" were deliberately selected for the reason that they would cover "transportation between points in the same state over a foreign country or the high seas as well as over another state." Hearings before a Subcommittee on Interstate Commerce, United States Senate, 74th Cong., 1st Sess., on S. 3027, p. 68.

The scheme of regulation provided by the federal act is complete and comprehensive. And the Board has fully exercised its authority over all phases and details of the Catalina operation. There is accordingly no room for California to exercise rate-making or other regulatory control over the transportation involved. *Wilmington Transportation Co.* v. *Railroad Commission of California,* 236 U. S. 151, 152; *Wilmington Transportation Co.* v. *Railroad Commission of California,* 166 Cal. 741, 137 Pac. 1153.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	4
Summary of argument	9
Argument:	
Introduction	12
I. The waters of the Pacific Ocean which lie between the three-mile marginal belt along the mainland of California and the three-mile marginal belt surrounding Santa Catalina Island are outside the boundaries of the State of California	12
II. Under the Civil Aeronautics Act, flights which involve passage over the high seas are subject to the exclusive regulatory authority of the Board	32
Conclusion	38
Appendix	39

CITATIONS

Cases:	
Air Transport Associates v. *Civil Aeronautics Board*, C. A. D. C. No. 11,118, dismissed February 18, 1952, certiorari denied, 344 U. S. 825	35
Air Transport Associates v. *Civil Aeronautics Board*, 199 F. 2d 181, certiorari denied, 344 U. S. 922	35
Ann, The, 1 Fed. Cas. No. 397, p. 926	17
Bethlehem Steel Co. v. *New York State Labor Relations Board*, 330 U. S. 767	37
C. & S. Air Lines v. *Waterman Corp.*, 333 U. S. 103	16
Catalina Air, Service to Santa Catalina Island, 2 C. A. B. 798	6
Church v. *Hubbart*, 2 Cranch 187	17
Chy Lung v. *Freeman*, 92 U. S. 275	24
Cooper, In re, 143 U. S. 472	16, 27
Cornell Steamboat Co. v. *United States*, 321 U. S. 634	32
Cunard S. S. Co. v. *Mellon*, 262 U. S. 100	17
Fagernes, The, L. R., (1927) P. 311 (C. A.)	18
Fisheries Case, I. C. J. Reports 1951, p. 116	10, 20, 27
Hines v. *Davidowitz*, 312 U. S. 52	25
Jones v. *United States*, 137 U. S. 202	9, 16, 27

Cases—Continued — Page

Manchester v. *Massachusetts*, 139 U. S. 240 ..... 10, 17, 22, 25
Marincovich, In re, 48 Cal. App. 474, 192 Pac. 156 ..... 10, 28, 30
People v. *Stralla*, 88 P. 2d 736 30
People v. *Stralla*, 14 Cal. 2d 617, 96 P. 2d 941 ..... 10, 31
Peru, Ex parte, 318 U. S. 578 18
Pollard's Lessee v. *Hagen*, 3 How. 212 19
Public Utilities Commission of Ohio v. *United Fuel Gas Co.*, 317 U. S. 456 37
Securities and Exchange Commission v. *United States Realty and Improvement Co.*, 310 U. S. 434 12
Suttori v. *Peckham*, 48 Cal. App. 88, 191 Pac. 960 30
Toomer v. *Witsell*, 334 U. S. 385 15
United Air Lines, Operation of Catalina Air Transport, 6 C. A. B. 1041 6
United Air Lines v. *Public Utilities Commission of California*, 342 U. S. 908 13
United States v. *Belmont*, 301 U. S. 324 ..... 10, 25
United States v. *Benner*, 24 Fed. Cas. No. 14,568 18
United States v. *California*, 332 U. S. 19 ..... 9, 10, 13, 15, 16, 17, 23, 27
United States v. *California*, 334 U. S. 855 13
United States v. *California*, 337 U. S. 952 13
United States v. *California*, 342 U. S. 891 13
United States v. *California*, 344 U. S. 872 14
United States of California, Report of Special Master ordered filed Nov. 10, 1952 ..... 19, 21, 22, 31
United States v. *Carillo*, 13 F. Supp. 121 31
United States v. *Liddle*, 26 Fed. Cas. No. 15,598 18
United States v. *Louisiana*, 339 U. S. 699 ..... 10, 23
United States v. *Ortega*, 27 Fed. Cas. No. 15,971 18
United States v. *Smiley*, 27 Fed. Cas. No. 16,317 17
United States v. *Texas*, 339 U. S. 707 ..... 10, 24
Vermilya-Brown Co. v. *Connell*, 335 U. S. 377 ..... 16, 18
Walsh v. *Archer*, 73 F. 2d 197 30
Wilmington, Catalina Air, Grandfather Certificate, 1 C. A. A. 431 6
Wilmington Transportation Co. v. *Railroad Commission of California*, 166 Cal. 741, 137 Pac. 1153 ..... 10, 11, 29
Wilmington Transportation Co. v. *Railroad Commission of California*, 236 U. S. 151 ..... 11, 30, 32, 37

Constitution and Statutes:

Act of April 21, 1910, 36 Stat. 326, 328 17
Act of Admission of California, 9 Stat. 452 29
California Constitution of 1849 28
Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401, *et seq.*:
- Sec. 1 ..... 3, 32
- Sec. 1 (10) 3
- Sec. 1 (20) 36

Constitution and Statutes—Continued
Civil Aeronautics Act of 1938, etc.—Continued Page
Sec. 1 (21) 3, 5, 11, 13, 33, 34, 36
Sec. 401 37
Sec. 403 ..... 36, 39
Sec. 404 ..... 36, 37
Sec. 407 37
Sec. 408 37
Sec. 409 37
Sec. 411 36
Sec. 412 37
Sec. 1002 ..... 33, 36, 37, 41
Outer Continental Shelf Lands Act (P. L. 212, 83rd Cong., 1st Sess.; 67 Stat. 462), Sec. 3 14
Submerged Lands Act (P. L. 31, 83rd Cong., 1st Sess., 67 Stat. 29) 15, 25
Sec. 2 26
Sec. 3 26
Sec. 4 ..... 22, 26, 27
Sec. 6 17
33 U. S. C. 151 14
Miscellaneous:
33 Code Fed. Reg. 82.135 15
Hearings before the Committee on Interior and Insular Affairs on Submerged Lands, United States Senate, 83rd Cong., 1st Sess., pp. 1052, 1059 18
Hearings before a Subcommittee on Interstate Commerce, United States Senate, 74th Cong., 1st Sess., on S. 3027, p. 68 ..... 11, 35–36
House Report No. 215, to accompany H. R. 4198, 83rd Cong., 1st Sess 14
Jefferson's Letter to the British Minister dated November 8, 1793 (H. Ex. Doc. 324, 43rd Cong., 2d Sess., p. 554; 1 Moore, *Digest of International Law*, 702) 16
Letter of Secretary of State Bayard to Secretary of Treasury Manning, dated May 28, 1886 (1 Moore, Digest of International Law, 718) 16
Letter from the State Department to the Attorney General, dated Nov. 13, 1951 ..... 18, 42
Letter from the State Department to the Attorney General, dated February 12, 1952 ..... 18, 20–21, 27, 48
1 Oppenheim, *International Law*, 7th ed., 1948, 415–417 20
Research in International Law, 1929, 23 A. J. I. L., Spec. Supp., 262 20
S. 3027, 74th Cong., 1st Sess., 1935 34–35

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HUIS, KENNETH POTTER, AND PETER E. MITCHELL, MEMBERS OF AND COLLECTIVELY CONSTITUTING THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; EVERETT C. MCKEAGE, WILSON E. CLINE, RODERICK B. CASSIDY, AND J. THOMASON PHELPS, LEGAL ADVISERS OF THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, APPELLANTS

v.

UNITED AIR LINES, INC., A CORPORATION; CATALINA AIR TRANSPORT, A CORPORATION; AND THE CIVIL AERONAUTICS BOARD, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE CIVIL AERONAUTICS BOARD

OPINION BELOW

The opinion of the district court (R. 47) is reported at 109 F. Supp. 13.

JURISDICTION

The final decree of the three-judge district court was entered on January 28, 1953 (R. 65, 67). A motion for new trial was filed on February 6, 1953 (R. 68), and denied on February 20, 1953 (R. 104). The petition for appeal was filed and allowed on March 27, 1953 (R. 105, 106).

The jurisdiction of this Court is invoked under 28 U. S. C. 1253, which provides for a direct appeal to this Court from an order granting or denying an injunction in a suit required to be heard and determined by a statutory three-judge court. On June 15, 1953, this Court postponed further consideration of its jurisdiction until the hearing on the merits (R. 265).

QUESTIONS PRESENTED

The three-judge district court held that air operations of appellee United Air Lines between the mainland of California and Santa Catalina Island (a part of California lying in the Pacific Ocean some thirty miles west of the mainland) were subject to the exclusive jurisdiction of the Civil Aeronautics Board, pursuant to provisions of the Civil Aeronautics Act which confer authority to regulate transportation between places in the same State "through the air space over any place outside thereof." The decree enjoins further attempts by the appellant transportation authorities of the State of California to assume regulatory control over the operations.

The questions raised by the appeal which are of primary concern to appellee Civil Aeronautics Board may be stated as follows:

1. Whether the waters of the Pacific Ocean which lie between the three-mile marginal belt along the mainland of California and the three-mile marginal belt surrounding Santa Catalina Island are outside the boundaries of the State of California.

2. If so, whether the United States, by the provisions of the Civil Aeronautics Act, has assumed exclusive jurisdiction to regulate United's operations between the mainland and Santa Catalina Island.

STATUTE INVOLVED

The Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401 *et seq.*, provides in part:

> Section 1. As used in this Act, unless the context otherwise requires—
>
> * * * * * *
>
> (10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.
>
> * * * * * *
>
> (21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation

or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession (except the Philippine Islands) of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Other provisions of the Act are set forth in the Appendix, *infra*, pp. 39–42.

STATEMENT

This is an appeal from a judgment granting declaratory and injunctive relief against attempts by appellants, the transportation regulatory authorities of the State of California, to assume regulatory control over the air transport opera-

tions of United Air Lines between the mainland of California and Santa Catalina Island. The island, a part of California, lies some thirty miles west of the mainland in the Pacific Ocean (R. 36; see, also, map, *infra*, p. 51). The air route in question extends from Los Angeles and Long Beach-Wilmington, on the mainland, to Avalon, on the island. The operations involve the transportation of persons and property.

United's operations over the Catalina route are conducted, with the approval of the Civil Aeronautics Board, under authority of a certificate of public convenience and necessity issued by the Board in 1939 to the predecessor of appellee Catalina Air Transport. This certificate was issued on findings by the Board that the boundaries of California do not extend beyond a distance of three miles from the shoreline of the mainland, and beyond a distance of three miles from the shoreline of Santa Catalina Island (R. 58). The grant of authority was rested upon the conclusions (1) that flights between the mainland and the island would necessarily pass over waters outside the boundaries of California, and (2) that the "air transportation" which the Civil Aeronautics Act, Section 1 (21) (a), subjects to federal regulation includes transportation between places in the same State "through the air space over any place outside thereof." (R. 35,

58); *Wilmington-Catalina Air, Grandfather Certificate*, 1 C. A. A. 431.[1]

Since 1939, the carriers authorized to fly the Catalina route have filed their tariffs with the Civil Aeronautics Board (R. 59), and their operations have been subject to detailed regulatory control by the Board (see R. 57–60). Tariffs for the operations have never been filed with the California Commission (R. 36, 59), and the Commission evinced no interest in the route until 1951, some twelve years after the Board had assumed full regulatory control (R. 47). In that year, by letters dated September 20, 1951 (R. 168, 36, 39), and December 27, 1951 (R. 168, 36, 44), the California Commission directed United to file tariffs for the Catalina operations, asserting that those operations were not within the

[1] The initial certificate was issued by the Board on October 13, 1939, under the "grandfather" provisions of the Civil Aeronautics Act, and authorized operations between Avalon and Wilmington. In 1941, the Board extended the route to Los Angeles and reissued the certificate in the name of the appellee Catalina Air Transport. R. 35, 58; *Catalina Air, Service to Santa Catalina Island*, 2 C. A. B. 798. In 1942, the Board authorized a suspension of operations in recognition of the fact that the carrier's equipment had been requisitioned for war purposes (R. 59). Thereafter, in 1946, the Board approved an operating contract between Catalina Air Transport and United Air Lines whereby United agreed to discharge all of the obligations of Catalina Air Transport under its certificate of public convenience and necessity. R. 35, 59; *United Air Lines, Operation of Catalina Air Transport*, 6 C. A. B. 1041. Operations under the contract were begun by United in 1946 and have continued to date (R. 59).

coverage of the Civil Aeronautics Act, but were "intrastate" activities "subject to regulation" by the Commission (R. 39, 44).

On June 25, 1952, the air carrier appellees filed a complaint for declaratory and injunctive relief (R. 1), alleging that the California Commission was threatening to bring penalty and reparation actions against them for their failure to file tariffs, and that they had no other adequate remedy (R. 4–6). The complaint asserts, in the alternative, that the Catalina operations are under the exclusive jurisdiction of the Civil Aeronautics Board; that, if the operations are subject to State control, air carriers are not subject to the penalty provisions which the Commission threatened to invoke; and that, if such penalty provisions are applicable, they are unreasonable and oppressive, in violation of the Fourteenth Amendment to the Constitution of the United States (R. 5).[2] The Civil Aeronautics Board intervened as a party plaintiff (R. 13, 21), alleging that it had exclusive jurisdiction over the Catalina operations (R. 22, 25).

A three-judge court was convened because of the carriers' contention going to the constitutionality of the California penalty provision. After trial, the district court held, *inter alia*, that

[2] The complaint alleges (R. 4–5) that the provision of the California Public Utilities Act with which the carriers were threatened provides for penalties of $2,000 per day for every day of violation.

there was a concrete controversy between the parties; that there was no adequate remedy in the state courts; that, in any event, the court ought not forego its jurisdiction, inasmuch as the primary question was the reach of a federal statute; and that the cause was ripe for declaratory and injunctive relief (R. 50, 63).

With respect to the merits, the court held that at least the waters between the three-mile marginal belts along the coastline of the mainland of California and surrounding Catalina Island were a part of the "high seas" and "wholly outside the territory and jurisdiction of the State of California" (R. 49, 63). It concluded, further, that transportation by aircraft between the mainland and the island constitutes air transportation as defined by the Civil Aeronautics Act (R. 64), and that the powers conferred upon and exercised by the Board "leave no room for State regulation * * * (R. 64).

Holding that it had been properly convened and that it had jurisdiction to determine the case on non-constitutional grounds (R. 49, 62), the three-judge court entered a decree declaring the Civil Aeronautics Board to have exclusive jurisdiction over the Catalina operations, and enjoining appellants from interfering with its authority (R. 66–67).

SUMMARY OF ARGUMENT

I

Appellants, adopting the position previously urged by California before the Special Master in *United States* v. *California*, No. 6, Original, assert that the boundary of California runs three miles west of a line enclosing all of the offshore islands so that the transporation here involved does not pass over an area outside of California. The area to Santa Catalina Island thus claimed as California territory consists of a stretch of twenty-four miles of deep water which is generally used and considered as part of the high seas.

The establishment of the external boundaries of the United States along its coasts is a political matter to be determined by the executive branch or by Congress rather than by the courts. *Jones* v. *United States*, 137 U. S. 202; *United States* v. *California*, 332 U. S. 19. The function of the courts is merely to apply a determination made by the Executive or by Congress.

As indicated by two letters from the State Department (Appendix *infra*, pp. 42–50), the executive branch takes the position that the territorial waters of the United States are to be measured from a line following the sinuosities of the coast rather than from a line drawn from point to point; that islands lying offshore have their own marginal belts; and that the area between the mainland and the islands if more than six miles

ARGUMENT

Introduction

The Civil Aeronautics Board intervened as a plaintiff below for the purpose of safeguarding its jurisdiction (R. 25). Cf. *Securities and Exchange Commission* v. *United States Realty and Improvement Co.*, 310 U. S. 434. Its primary concern is with a correct determination of the ultimate question—Are air operations between the mainland of California and Santa Catalina Island (and similar operations) subject to federal or to state regulation? Appellants contend, *inter alia*, that this question should not now be reached by this Court, while the air carrier appellees urge that it is ripe for decision. The issues preliminary to the merits have been fully briefed by these parties, and this brief will be confined to those matters which bear directly upon the ultimate issue—federal *versus* state regulatory authority in the area involved.

I

The waters of the Pacific Ocean which lie between the three-mile marginal belt along the mainland of California and the three-mile marginal belt surrounding Santa Catalina Island are outside the boundaries of the State of California

The Catalina operations were declared by the district court to be within the coverage of the Civil Aeronautics Act because air transportation between the island and the mainland requires passage above waters outside the boundaries of Cali-

fornia, and hence "between places in the same State of the United States through the air space over any place outside thereof" within the meaning of Section 1 (21) (a) of the Act (*supra*, pp. 3–4).[3] Appellants attack the correctness of this holding, asserting that the entire area is within the boundaries of California and adopting the position previously taken by California in the proceedings before the Special Master appointed by this Court in *United States* v. *California*, No. 6, Original, this Term.[4]

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[3] There is no issue here presented of whether the Civil Aeronautics Act would preempt the field of economic regulation of the Catalina operations if those operations involved only flights over California territory as, for example, do flights between Los Angeles and San Francisco. *United Air Lines* v. *Public Utilities Commission of California*, 342 U. S. 908, where this Court dismissed an appeal from a rate order of the California Commission for want of a substantial federal question, involved air transportation between Los Angeles and San Francisco only, and is inapposite here.

[4] That case originated in a complaint filed by the United States seeking a determination of the ownership of, or paramount rights in, the lands and minerals underlying the three-mile marginal belt lying seaward of the ordinary low water mark and outside the inland waters of California. This Court determined that the paramount right to these lands and resources was vested in the United States (*United States* v. *California*, 332 U. S. 19, 804). Thereafter the United States moved for a supplemental decree fixing the landward limit of the marginal belt along certain segments of the California coast (Petition for Entry of Supplemental Decree filed January 29, 1948). This Court by a series of orders has assigned the matters arising under this petition to a Special Master to take evidence and report (334 U. S. 855; 337 U. S. 952; 342 U. S. 891). In these proceedings, the United States has claimed that the line forming the shoreward limit of the

Santa Catalina Island is a part of Los Angeles County and was stipulated below as lying in the Pacific Ocean some thirty miles west of the Los Angeles area of the mainland of California (R. 36, see map, *infra*, p. 51). The waters immediately eastward of the Island are known as the San Pedro Channel. This channel connects areas of open water which are plainly a part of the high seas. The depth of the channel at its deepest is in excess of 450 fathoms, placing it beyond the limits of the continental shelf.[5] It is obviously unsuitable for the shelter or anchorage of vessels. The rules of navigation applicable to the high seas are in force in the channel,[6] and it is freely

marginal belt follows the sinuosities of the shore extending to the low water mark except at the entrances of harbors, rivers, and bays. California has claimed that there are large areas of inland waters intervening between the shore and the marginal belt, its most extensive claim of inland waters covering the entire area between the mainland and the offshore islands, including the area here in question. The Special Master submitted his report on October 14, 1952, accepting, so far as is here material, the contentions of the United States and specifically rejecting the California claim that the waters here involved are inland. This report was ordered filed on November 10, 1952 (344 U. S. 872). Exceptions to it have been filed by both California and the United States.

[5] See House Report No. 215 to accompany H. R. 4198, 83d Cong., 1st Sess., p. 6, where the limits of the outer continental shelf are said generally to occur at a depth of 100 fathoms. The location of the outer limits of the continental shelf is of no significance here, however, since the waters over the shelf beyond the territorial limits of the United States are high seas. See Section 3 (b) of the Outer Continental Shelf Lands Act, P. L. 212, 83rd Cong., 1st Sess.; 67 Stat. 462.

[6] Pursuant to authority conferred by 33 U. S. C. 151 to establish "lines dividing the high seas from rivers, harbors,

navigated by the ships of all nations.' In short, the channel has all the characteristics of the high seas.

Because of the distance between the island and the mainland, the district court did not consider the question of whether the three-mile belts of marginal sea adjacent to the California coast and over which the United States asserts jurisdiction are outside of the boundaries of California for purposes of the Civil Aeronautics Act (R. 63), nor is that question in issue here.[8] The district court held in substance that Santa Catalina Island lies seaward of the marginal belt along the coast line of the mainland and outside of inland waters and that the island has its own three-mile marginal belt (R. 63). The waters intervening between these belts, some twenty-four miles, were held by the district court to be part of the "high seas" and "not within the State of California" (R. 49, 63).

The assertion and maintenance of jurisdiction over our external boundaries, being a matter of

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and inland waters," the Coast Guard has established the line of demarcation between the "high seas" and the mainland to be the breakwater of San Pedro Bay (33 Code Fed. Reg. 82.135).

[7] Much testimony was taken before the Special Master in *United States* v. *California* on the use of these waters, and it was uncontested that they were extensively used for inter state and foreign commerce.

[8] *Cf. United States* v. *California*, 332 U. S. 19; the Submerged Lands Act (P. L. 31, 83d Cong., 1st Sess., 67 Stat. 29); and *Toomer* v. *Witsell*, 334 U. S. 385.

foreign relations and national defense, is essentially a political matter to be fixed and executed within the limits set by international law by the political branches of the government, the President and Congress, rather than the courts. *In re Cooper,* 143 U. S. 472, 502–503; *Jones* v. *United States,* 137 U. S. 202, 212–214; see *United States* v. *California,* 332 U. S. 19, 34. Decisions in the field of foreign policy "are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *C. & S. Air Lines* v. *Waterman Corp.,* 333 U. S. 103, 111. The function of the courts in deciding a dispute where such political judgments are pertinent is to apply the policy which has been adopted by the executive or Congress. *Vermilya-Brown Co.* v. *Connell,* 335 U. S. 377.

As good an example as any of this correlation of the functions of the political branches and the courts in this field is found in the assertion and establishment of jurisdiction over the three-mile marginal belt itself. The claim was first made by the executive branch of the government. See Jefferson's Letter to the British Minister dated November 8, 1793 (H. Ex. Doc. 324, 43d Cong., 2d Sess., 554; 1 Moore, *Digest of International Law,* 702); Letter of Secretary of State Bayard to Secretary of Treasury Manning, dated May 28, 1886 (1 Moore, *Digest of International*

Law, 718). Thereafter it was, and still is, given judicial recognition. *Church* v. *Hubbart*, 2 Cranch 187, 234 (1804); *The Ann*, 1 Fed. Cas. No. 397, p. 926 (C. C. D. Mass. 1812); *United States* v. *Smiley*, 27 Fed. Cas. No. 16,317, pp. 1132, 1134 (C. C. N. D. Cal. 1864); *Manchester* v. *Massachusetts*, 139 U. S. 240, 257–258 (1891). See *Cunard S. S. Co.* v. *Mellon*, 262 U. S. 100, 122–123. In *United States* v. *California*, 332 U. S. 19 at 33, this Court stated:

> That the political agencies of this nation both claim and exercise broad dominion and control over the three-mile marginal belt is now a settled fact.

Congressional action recognizing a territorial zone in the sea was not taken until 1910 when a statute regulating seal fishing covered limited offshore waters (36 Stat. 326, 328). The most recent recognition of the national interest in this area is found in Section 6 (a) of the Submerged Lands Act (P. L. 31, 83d Cong., 1st Sess.; 67 Stat. 29, 32).*

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* "The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act."

The position taken by the executive department on the location of the external boundary of the United States along its coasts is authoritatively set forth in two letters addressed by the State Department to the Attorney General, dated November 13, 1951, and February 12, 1952.[10] These letters are of such importance in determining the issue here involved that they are set forth in full in the Appendix of this brief, *infra*, pp. 42–50.[11] Insofar as is here material, these letters state that the territorial waters of the United States are to be measured from a line which "follows the indentations or sinuosities of the coast, and is not drawn from headland to headland" *infra*, pp. 43–44) except where there are bays, gulfs or estuaries not more than ten miles wide or where there are historic exceptions.[12] With respect to

[10] The position taken in these two letters was reaffirmed in testimony by an official of the State Department before a Senate committee in March of this year. See Hearings before Senate Committee on Interior and Insular Affairs on Submerged Lands, 83d Cong., 1st Sess., pp. 1052, 1059.

[11] A statement by the appropriate executive department as to the policy which it has followed is binding and conclusive on the courts that that is the policy which has in fact been followed. *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, 380–381; *Ex parte Peru*, 318 U. S. 578; *United States* v. *Benner*, 24 Fed. Cas. No. 14,568 (C. C. E. D. Pa.); *United States* v. *Ortega*, 27 Fed. Cas. No. 15,971 (C. C. E. D. Pa.); *United States* v. *Liddle*, 26 Fed. Cas. No. 15,598 (C. C. D. Pa.); *The Fagernes*, L. R. (1927) P. 311 (C. A.).

[12] In the proceedings before the Special Master in *United States* v. *California*, No. 6, Original, California asserted that

islands which lie off the coast, such as Santa Catalina, each island is regarded as having its own marginal belt (*infra*, p. 46). As to the water between the island and the mainland, it is considered a strait and, if the entrances are more than six miles in width, the belt of territorial waters should be measured in the ordinary way, that is, three miles along the coast and three miles around the island (*infra*, p. 47)." Thus inland waters, the land underlying which is owned by the states in trust for their citizens under the doctrine enunciated in *Pollard's Lessee* v. *Hagan*, 3 How. 212, are restricted to bays of deep indentation ten miles or less across the mouth, harbors, rivers, and channels leading to other island waters and do not

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certain areas here involved were "inland waters" by reason of historic usage and exceptions to the general rule. The United States challenged this assertion and, after taking evidence, the Special Master found against California (see Report of Special Master ordered filed November 10, 1952, pp. 30–39). Here, the appellants invoke no claim of historic exception save as they generally adopt the position taken by California in the earlier case. The position of the United States is fully set forth at pages 107 to 151 of its brief before the Special Master and at pages 47–78 of its reply brief, to which this Court is respectfully referred.

Additional copies of the Brief for the United States and the Reply Brief for the United States in *United States* v. *California* are being lodged with the Clerk. Those briefs contain a somewhat more extensive discussion of many of the propositions advanced in this brief.

[11] If the strait is less than six miles wide, but connects two areas of the high seas, then the waters are considered territorial waters, but not inland waters (*infra*, p. 47).

encompass any such expanse of water as is here claimed for California."[14]

There can be no doubt that the method of measuring territorial waters outlined above does not exceed the permissible limits of international law. The decision of the International Court of Justice in the *Fisheries Case*, I. C. J. Reports 1951, p. 116, is ample authority for the United States claim here involved. Of course, the claim of Norway which was there adjudicated covered a far more extensive area than is comprehended by the position taken by the United States as to its own territorial waters. But the very fact that the International Court approved the larger claim establishes that the lesser, which is here asserted, does not exceed internationally recognized limits.[15]

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[14] The status of waters as "inland" or not has at least three consequences: (a) it determines whether the underlying land is owned by the federal government or the states, except as modified by the Submerged Lands Act; (b) it serves as the landward boundary for the three-mile marginal belt and therefore determines how far seaward the jurisdiction of the nation extends; and (c) it results in restrictions on the use of the waters by foreign vessels which do not exist in the marginal belt (*Research in International Law*, 1929, 23 A. J. I. L., Spec. Supp., 262; 1 Oppenheim, *International Law*, 7th ed., 1948, 415–417).

[15] It is equally clear that the decision does not hold that the territorial and inland waters of every nation are automatically extended to the limits approved for Norway, since the extent of the area depends in the first instance on the claim of the sovereign involved. See *Fisheries Case*, *supra*, pp. 131–132. This aspect of this case is pointed out in the letter of

And since the areas asserted by appellants here to be inland waters include all the area claimed by the United States and much more, they must agree that the federal claim does not exceed the allowable claim under international law. The precedents are reviewed at some length in the brief for the United States before the Special Master in *United States* v. *California* (see pp. 53–92) and the Court is respectfully referred to that brief.

The district court's determination that the waters between Santa Catalina Island and the mainland are high seas outside the boundaries of California is in perfect accord with the findings of the Special Master in *United States* v. *California* contained in his report ordered filed on November 10, 1952. The first question which the Special Master was requested to answer was (Report p. 1):

> What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

February 12, 1952, from the Secretary of State to the Attorney General where he states:

"The decision * * * leaves the choice of the method of delimitation applicable under such criteria to the national state. * * *" [Appendix, *infra*, p. 50.]

The answer made by the Special Master was (Report pp. 2–3):

> The channels and other water areas between the mainland and the offshore islands within the area referred to by California as the "over-all unit area" are not inland waters. They lie seaward of the baseline of the marginal belt of territorial waters, which should be measured in each instance along the shore of the adjoining mainland or island, each island having its own marginal belt.

It is submitted that this conclusion is amply supported by the authorities and precedents cited by the Special Master in his report.

Appellants, none the less, insist that the seaward boundary of California, established by its original Constitution, and by the 1949 statute which purports to interpret the constitutional provision, is a line three miles west of a line running from points on the mainland around the outermost of the islands which concededly are a part of California (App. Br. pp. 46–59). In reliance upon *Manchester* v. *Massachusetts*, 139 U. S. 240, and Section 4 of the Submerged Lands Act (P. L. 31, 83d Cong., 1st Sess.; 67 Stat. 31), appellants assert that California may fix its boundaries in any manner consistent with recognized principles of international law.

The fallacy in this argument is that the extent of California's territory in the marginal seas, and hence that of the United States, is not a matter

for unilateral determination by California."[16] The national character of this area was emphasized in each of the three submerged lands cases. In *United States* v. *California*, 332 U. S. 19, 35–36, the Court said:

> The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. * * *
> —The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; * * *. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual state, so, if wars come, they must be fought by the nation. See *Chy Lung* v. *Freeman*, 92 U. S. 275, 279. The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks.

In *United States* v. *Louisiana*, 339 U. S. 699, 704, the Court said:

> The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, na-

[16] For a detailed discussion and collection of authorities on this point, see pp. 107–129 of Brief for the United States before the Special Master in *United States* v. *State of California*, No. 6, Original.

> tional defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

In *United States* v. *Texas*, 339 U. S. 707, 719, the Court said:

> * * * as pointed out in *United States* v. *California*, once low-water mark is passed the international domain is reached. * * * If the property, whatever it may be, lies seaward of low-water mark, its use, disposition, management, and control involve national interests and national responsibilities.

Earlier, in dealing with a California regulation requiring the posting of bonds by certain aliens, this Court had invalidated the requirement as contrary to the exclusive power of the Federal Government in the field of foreign affairs. *Chy Lung* v. *Freeman*, 92 U. S. 275. The Court stated at 279–280:

> Upon whom would such a claim [by a foreign nation] be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States. If that government should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union? If we should conclude that a pecuniary indemnity was proper as a satisfaction for the injury, would California pay it, or the Federal gov-

> ernment? If that government has forbidden the States to hold negotiations with any foreign nations, or to declare war, and has taken the whole subject of these relations upon herself, has the Constitution, which provides for this, done so foolish a thing as to leave it in the power of the States to pass laws whose enforcement renders the general government liable to just reclamations which it must answer, while it does not prohibit to the States the acts for which it is held responsible?
>
> The Constitution of the United States is no such instrument.

To the same effect, see *Hines* v. *Davidowitz,* 312 U. S. 52, 63–64.

In this realm of external sovereignty, the controlling factor is not what California asserts, but what the Nation asserts and is willing to defend. Cf. *United States* v. *Belmont,* 301 U. S. 324, 331–332. Therefore, California obviously can neither acquire territory in the marginal seas nor settle its boundaries in a manner inconsistent with the national policy.

Manchester v. *Massachusetts,* 139 U. S. 240, holds only that a State may extend its boundaries to include adjacent waters which are within national sovereignty, in that case a bay the entrance to which was less than ten miles across. That principle has been adopted in the Submerged Lands Act, for the limited purposes of that Act (P. L. 31, 83d Cong., 1st Sess.; 67 Stat. 29). That

Act purports to vest in the respective states title to the submerged lands within their boundaries as they existed when they entered the Union or as thereafter approved by Congress (Secs. 2, 3 and 4). Certainly the Act does not purport, as appellants seem to think (App. Br. 57–58), to authorize the States to extend their boundaries after their admittance to the Union beyond the limits of presently recognized national sovereignty without the specific approval of Congress.[17]

Congress has not approved the 1949 California statute, purporting to interpret the Constitution as fixing California's boundaries to include the water areas between the mainland and the off-

[17] Section 4, 67 Stat. 31, provides:

"Seaward Boundaries.—The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

shore islands, upon which appellants rely (App. Br. 51–52). Moreover, the United States does not assert national claims which would include that area, similar to those made by Norway and approved by the International Court of Justice in the *Fisheries Case*, I. C. J. Reports 1951, p. 116. The established national policy has remained unaltered by that decision. See Letter of Secretary of State Acheson to Attorney General McGrath, dated February 12, 1952, *infra*, pp. 48–50. No change in the policy of the United States can be accomplished by an act of the California legislature. The national policy with respect to the waters here involved, established by the political branches of the National Government in which such matters are entrusted under our constitutional scheme, plainly is controlling here unless the appellants can demonstrate that an exception has been provided in the case of the waters here involved. *United States* v. *California*, 332 U. S. 19, 34; *Jones* v. *United States*, 137 U. S. 202, 212–214; *In re Cooper*, 143 U. S. 472, 502–503.

A departure from the general position of the United States is claimed by virtue of the Congressional acceptance of the California Constitution upon the admission of the State to the Union. If that Constitutional provision were properly interpreted to read as appellants here assert, Section 4 of the Submerged Lands Act, *supra*, would constitute a Congressional recogni-

tion of the extended boundary. However, it is apparent that the Constitutional provision defining the boundaries did not include within the State the waters here involved.

The 1849 Constitution of California, upon which appellants rely, in describing the borders of the state (after describing the southern boundary), stated (Art. XII, Sec. 4):

> thence running west, along said boundary line, to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific coast to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. Also, all the islands, bays and harbors along and adjacent to the coast.

This provision has remained substantially unaltered.

The geographical boundaries of the State are completely delineated without reference to the coastal islands. The reference to these islands in a separate sentence was intended to signify, we believe, only that the islands were claimed as a part of California territory, and not all of the waters between the mainland and the islands. See *In re Marincovich*, 48 Cal. App. 474, 192 Pac. 156, 158.[18]

[18] This interpretation of these constitutional provisions appears to have been shared by the California legislature prior

In any event, it cannot be said that an intention on the part of the State to include the ocean waters between the islands and the mainland within its boundaries was made so manifest by this constitutional provision as to warrant an assumption that the United States has concurred in the State's claim through the Act of Admission (9 Stat. 452). On the contrary, the State constitutional provisions obviously are required to be interpreted with reference to the usage of the United States in defining its exterior boundaries, and they have been uniformly so interpreted in the past by both the State and Federal Courts.

In *Wilmington Transportation Co.* v. *Railroad Commission of California*, 166 Cal. 741, 137 Pac. 1153 (1913), the California Supreme Court found, as the Railroad Commission there conceded, that one traveling from the mainland to Santa Catalina Island "must travel for upward of twenty miles upon the high seas, outside of the territorial jurisdiction of this state." In affirming this decision, this Court also recognized that ships in their

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to the submerged lands controversy. Thus, the seaward boundaries of the coastal counties habitually have been described by the legislature as coinciding with the State's boundaries, and the boundary descriptions often have contained references to fixed geographical locations on the coastline of the mainland. These actions make plain the understanding of the legislature that the State boundaries extended no more than three miles from the shoreline of the mainland. See pp. 133–148 of Brief for the United States before the Special Master in *United States* v. *State of California*, No. 6, Original.

direct passage between the mainland and the Island "must traverse the high seas for upwards of twenty miles." *Wilmington Transportation Co.* v. *Railroad Commission of California,* 236 U. S. 151, 152.

In other cases, after considering the constitutional provision in the light of international law, the California courts have held that the boundaries of Santa Catalina Island extend only to the three-mile belt of marginal waters surrounding the Island. *In re Marincovich,* 48 Cal. App. 474, 192 Pac. 156 (1920). See, also, *Suttori* v. *Peckham,* 48 Cal. App. 88, 191 Pac. 960 (1920). The United States District Court for the Southern District of California also has held that a murder committed on a vessel located between this belt and the three-mile belt along the shoreline of the mainland was committed on the high seas. See *Walsh* v. *Archer,* 73 F. 2d 197 (C. A. 9).[19] In *People* v. *Stralla,* 88 P. 2d 736 (Cal. App., 1939), the problem of the extent of California's boundaries in these waters also was considered. The court held that a gambling ship located more than three miles from the shoreline of Santa Monica Bay, but within the waters encompassed by a line drawn between the headlands of the Bay, was located on the high seas, notwithstanding the objections of one judge who believed that the

[19] The Court of Appeals did not reach this issue, but its opinion sets forth the instructions of the lower court to the jury which embody the principles for which the case is cited.

entire waters between the mainland and Catalina Island were within the State boundaries. This decision was reversed by the Supreme Court of California solely on the ground that the "headland theory" applied to the waters of the Bay, and hence that California's boundaries extended three miles seaward of a line drawn between the headlands. *People* v. *Stralla*, 14 Cal. 2d 617, 96 P. 2d 941 (1939). By an application of the headland theory, it also has been held that California has jurisdiction in these marginal seas three miles seaward of a line between the headlands of San Pedro Bay. *United States* v. *Carillo*, 13 F. Supp. 121 (S. D. Calif.).[20]

Thus, the appellants' contention regarding the boundaries of the State are opposed by (a) the historic position of the United States respecting its international boundaries, (b) express decisions of the California courts and of this Court, as well as the State's own understanding of its boundary prior to 1949, and (c) the conclusions of the Special Master in *United States* v. *California*. At least 24 miles of the waters between Santa Cata-

[20] The Special Master in *United States* v. *State of California*, No. 6, Original, rejected California's claim that the waters of the Santa Monica and San Pedro Bays are inland waters of California, and that the headland theory was applicable to these bays. The question is not material here. Assuming that California has jurisdiction over the entire waters of these bays and three miles beyond, there still remains a substantial portion of high seas between the marginal belts. See map, *infra*, p. 51.

lina Island and the mainland are high seas outside of the State of California.

II

Under the Civil Aeronautics Act, flights which involve passage over the high seas are subject to the exclusive regulatory authority of the Board

It may be conceded that, in the absence of an applicable federal statute, the state authorities could regulate air transportation between the California mainland and Santa Catalina. This Court has previously held that California could regulate surface transportation between these places 'in the absence of Federal interpolation" (*Wilmington Transportation Co.* v. *Railroad Commission of California,* 236 U. S. 151, 156),[n] and the same would appear to hold true of air operations. But the plain fact is that, in the field of air transportation, Congress has interposed its authority, and in a manner which leaves no room for state regulation.

The "air transportation" over which the Civil Aeronautics Act asserts full dominion is defined in Section 1, *supra,* pp. 3–4. In subparagraph 10 of that Section, it is stated that air transportation

[n] In *Cornell Steamboat Co.* v. *United States,* 321 U. S. 634, 639, this Court stated that its decision in the *Wilmington* case "held that transportation on the high seas between two points within the state of California, Santa Catalina Island and San Pedro, being 'local' and not involving 'passage through the territory of another state,' was subject to rate regulation by California in the absence of controlling federal legislation."

"means interstate, overseas, or foreign air transportation"." The latter terms are further defined in subparagraph 21, interstate air transportation being described (par. 21 (a)) as transportation between

> a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or *between places in the same State of the United States through the air space over any place outside thereof*; or between places in the same Territory or possession (except the Philippine Islands) of the United States, or the District of Columbia * * *. [Italics supplied.]

The italicized language is plain. Read as written, it undeniably covers flights between places in the same state over the high seas.

Appellants suggest, however, that notwithstanding this unambiguous textual definition, the operation is so predominantly local in nature that Congress must have intended to limit the scope of the definition to that transportation which passes over the territory of another state.[22] If that was the

[22] These classifications were apparently adopted by Congress for reasons of drafting convenience. The incidence of various regulatory provisions (see, *e. g.*, Section 1002 (d), *infra*, p. 41) was made dependent upon the particular classification of air transportation involved.

[23] It is not at all clear what appellants mean when they attempt to draw a distinction between "territorial boundaries" and "jurisdictional boundaries" (App. Br. 63). Per-

intention of Congress (as we shall point out *infra*, the legislative history shows the exact opposite), it would have been a very simple matter to say, as an early bill said before it was deliberately altered, transportation "between places in the same state through another state * * *" (S. 3027, 74th Cong., 1st Sess., 1935). Congress, accordingly, must be taken to have meant what it plainly stated—"*any place*" outside a state.

The conclusion that the term "interstate", as used in the Act, has a distinct statutory meaning, and that it is not limited by meanings or connotations which characterize use of the term in other contexts, is further supported by the fact that interstate air transportation is also defined in Section 1 (21) (a) to include transportation "between places in the same Territory or possession * * * of the United States."

It is also significant that "overseas" transportation, defined in Section 1 (21) (b) comprehends transportation between "a place in any State of the United States * * * and any place in a Territory or possession of the United States * * *." This definition fully covers, for example, transportation between the Territory of Alaska and a place in the United States. The fact that such

haps they intend to refer to the holding in the *Wilmington Transportation Co.* case upholding the "jurisdiction" of the state where the commerce is essentially local and does not conflict with an exercise of federal power. If so, the concept has no room here since, as is pointed out below, the federal government has preempted the field.

transportion is actually performed by flight over Canada, rather than by flight over the seas, does not mean that it is not "overseas" transportation in the statutory sense, and that it is excepted from the Act's coverage—an untenable supposition in the light of the statutory scheme." It indicates simply that "overseas" does not have the same meaning in all statutes.

Thus, the terms "interstate", "overseas", and "foreign", as used in the Civil Aeronautics Act, are terms of art, terms to be read by reference to that Act's definitions and not by reference to other contexts in which they may have varying meanings.

Examination of the legislative history completely confirms the conclusion that Congress meant precisely what it said in Section 1 (21) (a). One of the first bills for the regulation of interstate air commerce (S. 3027, 74th Cong., 1st Sess., 1935) defined interstate commerce as "commerce * * * between places in the same state through another state * * *." During the course of the hearing on S. 3027, Senator Wheeler, chairman of the subcommittee concerned, requested from Mr. Joseph Eastman, Federal Coordinator of Transportation, suggested corrections in the bill.

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[36] The Board has regulated air transportation between the United States and Alaska since the inception of the Act. See, *e. g.*, *Air Transport Associates* v. *Civil Aeronautics Board*, C. A. D. C. No. 11,118, dismissed February 18, 1952, certiorari denied, 344 U. S. 825; *idem*, 199 F. 2d 481 (C. A. D. C.) certiorari denied, 344 U. S. 922.

Replying by a letter dated July 31, 1953, Mr. Eastman stated (Hearings Before a Subcommittee on Interstate Commerce, United States Senate, 74th Cong., 1st Session, on S. 3027, p. 68):

> * * * it is suggested * * * that after the word "through" in line 18 there be substituted for the words "another state", the words "the air space over any place outside thereof." The latter change would include as interstate commerce *transportation between points in the same state over a foreign country or the high seas as well as over another state.* [Italics added.]

The suggested change appears in all bills following the date of Mr. Eastman's letter, and is now contained, not only in Section 1 (21) of the Act, but also in Section 1 (20) which defines "air commerce" (49 U. S. C. 401 (20)).

Assuming, as we believe one must, the applicability of the federal statute in the circumstances here presented, it is entirely clear that there is no room for state action. The Civil Aeronautics Act embodies a complete and comprehensive scheme of regulatory control. Tariffs for interstate air transportation must be filed by air carriers with the Board and must be strictly observed (Section 403, *infra*, p. 39). The Board has plenary authority to fix rates and charges (Section 1002 (d); 49 U. S. C. 642, *infra*, p. 41) and, also, to prescribe carrier practices in connection with the performance of transportation (Sections 404, 411; 49

U. S. C. 484, 491). Operations may be instituted, suspended or terminated only by leave of the Board (Sections 401 (a), (k); 49 U. S. C. 481 (a), (k)). The determination whether service is adequate (Sections 404, 1002; 49 U. S. C. 484, 642), the prescription of requirements for the maintenance of accounts and records (Section 407, 49 U. S. C. 487), the supervision of contracts between carriers affecting air transportation (Section 412, 49 U. S. C. 492), and the screening of intercorporate relationships involving air carriers (Sections 408, 409; 49 U. S. C. 488, 489) are likewise matters fully committed to the Board.

Under its statutory mandate, the Board has exercised complete control over operations between the California mainland and Santa Catalina since the adoption of the federal statute in 1938. California cannot fix rates for the Catalina operations in the light of the power conferred upon the Board to fix rates for the same transportation. *Wilmington Transportation Company* v. *Railroad Commission of the State of California*, 236 U. S. 151, 156; *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 467–8; *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 775–6. Similarly, with respect to other phases of regulation, it may be categorically stated that there is no room for both federal and state control, and that the federal power is dominant and exclusive.

CONCLUSION

The district court correctly determined that regulation of the Catalina operations falls within the exclusive province of the Civil Aeronautics Board.

Respectfully submitted,

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NOVEMBER, 1953.

APPENDIX

The Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401 *et seq.*:

SEC. 403 (a) Every air carrier and every foreign air carrier shall file with the [Board], and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by it and points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the [Board], all classifications, rules, regulations, practices, and services in connection with such air transportation. Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the [Board] shall by regulation prescribe; and the [Board] is empowered to reject any tariff so filed which is not consistent with this section and such regulations. Any tariff so rejected shall be void. The rates, fares, and charges shown in any tariff shall be stated in terms of lawful money of the United States, but such tariffs may also state rates, fares, and charges in terms of currencies other than lawful money of the United States, and may, in the case of foreign air transportation, contain such information as may be required under the laws of any country in or to which an air carrier or foreign air carrier is authorized to operate.

(b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; and no air carrier or foreign air carrier shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the [Board] to be specified in such tariffs, except those specified therein. Nothing in this Act shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the [Board] may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees and their immediate families; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation, to such other persons and under such other circumstances as the [Board] may by regulations prescribe.

(c) No change shall be made in any rate fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, specified in any effective tariff of any air carrier or foreign air carrier,

except after thirty days' notice of the proposed change filed, posted, and published in accordance with subsection (a) of this section. Such notice shall plainly state the change proposed to be made and the time such change will take effect. The [Board] may in the public interest, by regulation or otherwise, allow such change upon notice less than that herein specified, or modify the requirements of this section with respect to filing and posting of tariffs, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(d) Every air carrier or foreign air carrier shall keep currently on file with the [Board], if the [Board] so requires, the established divisions of all joint rates, fares, and charges for air transportation in which such air carrier or foreign air carrier participates.

SEC. 1002 * * *

(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the [Board] shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the [Board] shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective:

Provided, That as to rates, fares, and charges for overseas air transportation, the [Board] shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge.

Letters From the State Department to the Attorney General

IN REPLY REFER TO L/EUR

Department of State,
Washington, November 13, 1951.

My Dear Mr. Attorney General: Reference is made to your letter dated October 30, 1951, requesting a statement from the Department of State in regard to the position of the United States as to the principles or criteria which govern the delimitation of the territorial waters of the United States. You ask in particular how such delimitation is made in the case of:

(a) A relatively straight coast, with no special geographic features, such as identations or bays;

(b) A coast with small indentations not equivalent to bays;

(c) Deep indentations such as bays, gulfs or estuaries;

(d) Mouths of rivers which do not form an estuary;

(e) Islands, rocks or groups of islands lying off the coast;

(f) Straits, particularly those situated between the mainland and offshore islands.

In the formulation of United States policy with respect to territorial waters and in the determination of the principles applicable to any problem

connected therewith, such as the problem of delimiting territorial waters, the Department of State has been and is guided by generally accepted principles of international law and by the practice of other states in the matter.

(a) In the case of a relatively straight coast, with no special geographic features such as indentations c bays, the Department of State has traditionally taken the position that territorial waters should be measured from the low water mark along the coast. This position was asserted as early as 1886 (The Secretary of State, Mr. Bayard, to Mr. Manning, Secretary of the Treasury, May 28, 1886, I Moore, *Digest of International Law*, 720). It was maintained in treaties concluded by the United States. (See Article 1 of the Convention concluded with Great Britain for the Prevention of Smuggling of Intoxicating Liquors on January 23, 1924, 43 Stat. 1761.) This position was in accord with the practice of other states. (See Article 2 of the Convention between Great Britain, Belgium, Denmark, France, Germany, and the Netherlands for regulating the Police of the North Sea Fisheries signed at The Hague, May 6, 1882, 73 *British and Foreign State Papers*, 39, 41, and Article 2 of the Convention between Germany, Denmark, Estonia, Finland, France, the British Empire, Italy, Latvia, Poland and Sweden, relating to the Non-Fortification and Neutralization of the Aaland Islands, concluded at Geneva on October 20, 1921, 9 *League of Nations Treaty Series*, 212, 217.) The United States maintained the same position at the Conference for the Codification of International Law held at The Hague in 1930. (See League of Nations,

Bases of Discussion for the Conference for the Codification of International Law, II, Territorial Waters, C. 74 M. 39, 1929, V., 143, hereinafter referred to as *Bases of Discussion*.) The report of the Second Sub-Committee adopted the low water mark as the base line for the delimitation of territorial waters. (League of Nations, Acts of the Conference for the Codification of International Law, III, Territorial Waters, C. 351 (b) M. 145 (b), 1930, V., 217, hereinafter referred to as *Acts of Conference*.)

(b) The Department of State has also taken the position that the low water mark along the coast should prevail as the base line for the delimitation of territorial waters in the case of a coast with small indentations not equivalent to bays: the base line follows the indentations or sinuosities of the coast, and is not drawn from headland to headland. This position was already established in 1886. (See the letter from the Secretary of State Mr. Bayard to Mr. Manning, Secretary of the Treasury, dated May 28, 1886, *supra*.) The United States maintained this position at the Hague Conference of 1930. (See Amendments to Bases of Discussion proposed by the United States, *Acts of Conference*, 197.) The principle that all points on the coast should be taken into account in the delimitation of territorial waters was adopted in the report of the Second Sub-Committee (*Acts of Conference*, 217).

(c) The determination of the base line in the case of a coast presenting deep indentations such as bays, gulfs, or estuaries has frequently given rise to controversies. The practice of states,

nevertheless, indicates substantial agreement with respect to bays, gulfs or estuaries no more than 10 miles wide: the base line of territorial waters is a straight line drawn across the opening of such indentations, or where such opening exceeds 10 miles in width, at the first point therein where their width does not exceed 10 miles. (See Article 2 of the Convention between Great Britain, Belgium, Denmark, France, Germany and the Netherlands, for regulating the Police of the North Sea Fisheries, signed at The Hague, May 6, 1882, 73 *Foreign and British State Papers,* 39, 41; The North Atlantic Coast Fisheries Arbitration between the United States and Great Britain of September 7, 1910; *U. S. Foreign Rel.,* 1910 at 566; and the Research in International Law of the Harvard Law School, 23 American Journal of International Law, SS, 266.

Subect to the special case of historical bays, the United States supported the 10 mile rule at the Conference of 1930 (*Acts of Conference,* 197–199) and the Second Sub-Committee adopted the principle on which the United States relied (*Acts of Conference,* 217–218). It was understood by most delegations that, as a corollary to the adoption of this principle, a system would be evolved to assure that slight indentations would not be treated as bays (*Acts of Conference,* 218). The United States proposed a method to determine whether a particular indentation of the coast should be regarded as a bay to which the 10 mile rule would apply (*Acts of Conference,* 197–199). The Second Sub-Committee set forth the American proposal and a compromise proposal offered

by the French delegation in its report, but gave no opinion regarding these systems (*Acts of Conference,* 218–219).

(d) With respect to mouths of rivers which do not flow into estuaries, the Second Sub-Committee agreed to take for the base line a line following the general direction of the coast and drawn across the mouth of the river, whatever its width (*Acts of Conference,* 220).

(e) With respect to the measurement of territorial waters when rocks, reefs, mudbanks, sandbanks, islands or groups of islands lie off the coast, the United States took the position at the Conference that separate bodies of land which were capable of use should be regarded as islands, irrespective of their distance from the mainland, while separate bodies of land, whether or not capable of use, but standing above the level of low tide, should be regarded as islands if they were within three nautical miles of the mainland. Each island, as defined, was to be surrounded by its own belt of territorial waters measured in the same manner as in the case of the mainland (*Acts of Conference,* 200).

The report of the Second Sub-Committee defined an island as a separate body of land, surrounded by water, which was permanently above high water mark, and approved the principle that an island, so defined, had its own belt or territorial sea (*Acts of Conference,* 219). While the Second Sub-Committee declined to define as islands natural appendages of the sea-bed which were only exposed at low tide, it agreed, nevertheless, that such appendages, provided they were situated within the territorial sea of the mainland,

should be taken into account in delimiting territorial waters (*Acts of Conference,* 217).

(f) The problem of delimiting territorial waters may arise with respect to a strait, whether it be a strait between the mainland and offshore islands or between two mainlands. The United States took the position at the Conference that if a strait connected two seas having the character of high seas, and both entrances did not exceed six nautical miles in width, all of the waters of the strait should be considered territorial waters of the coastal state. In the case of openings wider than six miles, the belt of territorial waters should be measured in the ordinary way (*Acts of Conference,* 200–201). The report of the Second Sub-Committee supported this position with the qualification that if the result of this determination of territorial waters left an area of high sea not exceeding two miles in breadth surrounded by territorial sea, this area could be assimilated to the territorial sea (*Acts of Conference,* 220).

The Second Sub-Committee specified in its observations on this subject that the waters of a strait were not to be regarded as inland waters, even if both belts of territorial waters and both shores belonged to the same state (*Acts of Conference,* 220). In this, it supported the policy of the United States to oppose claims to exclusive control of such waters by the nation to which the adjacent shore belonged. (The Secretary of State, Mr. Evarts, to the American Legation, Santiago, Chile, January 18, 1879, in connection with passage through the Straits of Magellan, I Moore, *Digest of International Law,* 664). With respect to a strait which is merely a channel of communi-

cation to an inland sea, however, the United States took the position, with which the Second Sub-Committee agreed, that the rules regarding bays should apply (*Acts of Conference*, 201, 220).

In connection with the principles applicable to bays and straits, it should be noted that they have no application with respect to the waters of bays, straits, or sounds, when a state can prove by historical usage that such waters have been traditionally subjected to its exclusive authority. The United States specifically reserved this type of case at the Hague Conference of 1930 (*Acts of Conference*, 197).

The principles outlined above represent the position of the United States with respect to the criteria properly applicable to the determination of the base line of territorial waters and to the demarcation between territorial waters and inland waters.

Sincerely yours,

JAMES E. WEBB,
Acting Secretary.

The Honorable J. HOWARD MCGRATH,
Attorney General.

IN REPLY REFER TO L/EUR

DEPARTMENT OF STATE,
Washington, February 12, 1952.

MY DEAR MR. ATTORNEY GENERAL: Reference is made to your letter of January 22, 1952, inquiring whether, in the light of the decision of the International Court of Justice in the Fisheries Case (*United Kingdom* v. *Norway*) in date of December 18, 1951, the Department adheres to the statement of position given at your request on Novem-

ber 13, 1951, with respect to the principles or criteria governing the delimitation of the territorial waters of the United States.

The Department noted the holding of the Court that the Norwegian Government in fixing the base lines for the delimitation of Norwegian fisheries by applying the straight base lines method had not violated international law, especially in view of the peculiar geography of the Norwegian coast and of the consolidation of this method by a constant and sufficiently long practice.

The decision of the Court, however, does not indicate, nor does it suggest, that other methods of delimitation of territorial waters such as that adopted by the United States are not equally valid in international law. The selection of base lines, the Court pointed out, is determined on the one hand by the will of the coastal state which is in the best position to appraise the local conditions dictating such selection, and on the other hand by international law which provides certain criteria to be taken into account such as the criteria that the drawing of base lines must not depart to any appreciable extent from the general direction of the coast, that the inclusion within those lines of sea areas surrounded or divided by land formations depends on whether such sea areas are sufficiently closely linked to the land domain to be subject to the regime of internal waters, and that economic interests should not be overlooked the reality and importance of which are clearly evidenced by long usage.

In the view of the Department, the decision of the International Court of Justice in the Fisheries Case does not require the United States to change

its previous position with respect to the delimitation of its territorial waters. It is true that some of the principles on which this United States position has been traditionally predicated have been deemed by the Court not to have acquired the authority of a general rule of international law. Among these are the principle that the base line follows the sinuosities of the coast and the principle that in the case of bays no more than 10 miles wide, the base line is a straight line across their opening. These principles, however, are not in conflict with the criteria set forth in the decision of the International Court of Justice. The decision, moreover, leaves the choice of the method of delimitation applicable under such criteria to the national state. The Department, accordingly, adheres to its statement of the position of the United States with respect to delimitation of its territorial waters in date of November 13, 1951.

Sincerely yours,

DEAN ACHESON.

The Honorable J. HOWARD MCGRATH,
Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1965

SANTA MONICA BAY

PT. F

SAN PEDRO BAY

PT. FERMIN

NEWPORT BEACH

GULF OF SANTA CATALINA

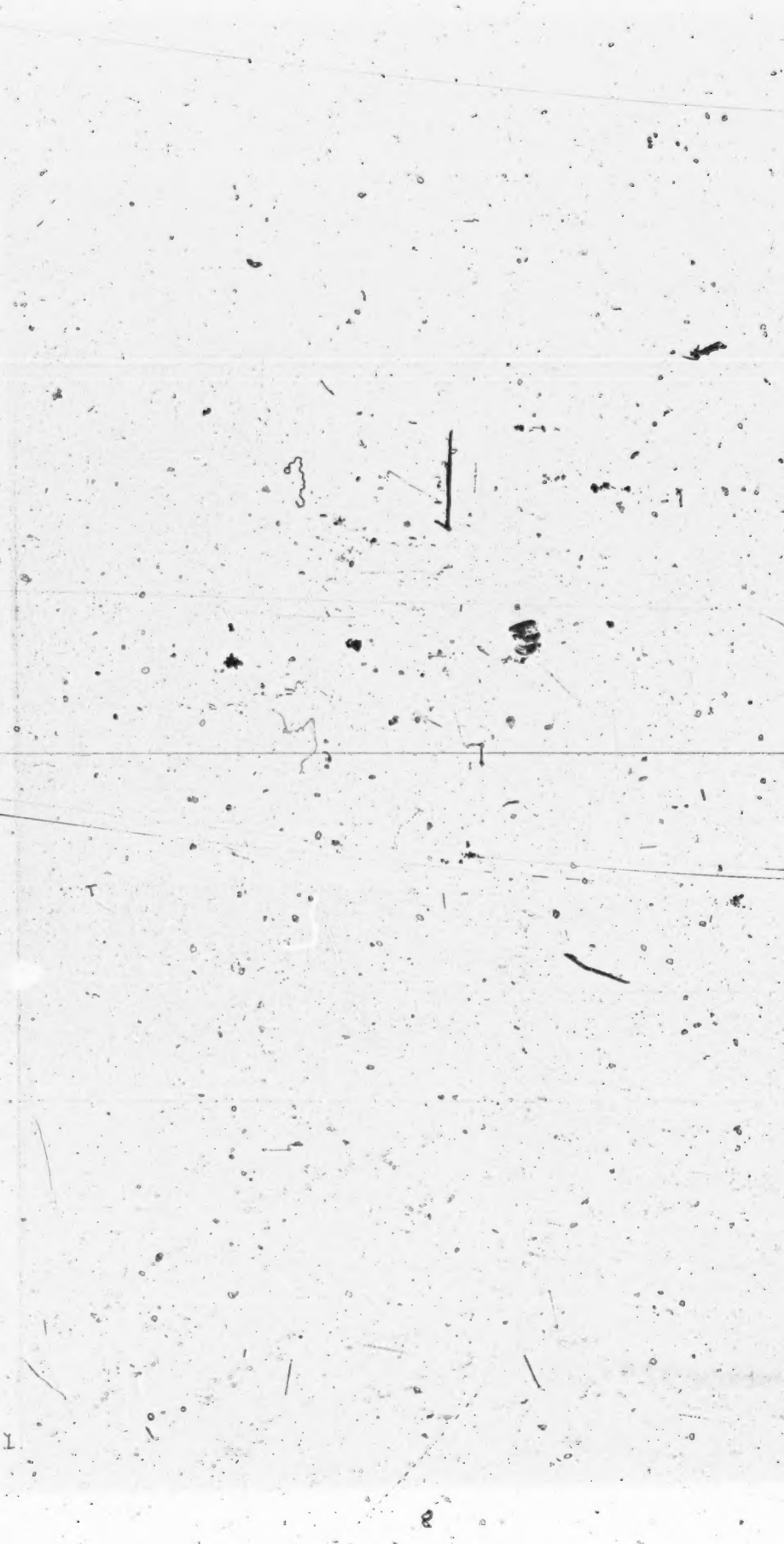
UNITED STATES - WEST COAST
CALIFORNIA

SAN DIEGO TO SANTA ROSA ISLAND

LINES INDICATING 3-MILE MARGINAL BELT

5101

(San Diego to Santa Rosa Island) USCGS 5101



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SUPREME COURT, U.S.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. 87

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; RICHARD E. MITTELSTAEDT, JUSTUS F. CRAEMER, et al.,

Appellants,

vs.

UNITED AIR LINES, INC., a Corporation, CATALINA AIR TRANSPORT, a Corporation, and CIVIL AERONAUTICS BOARD,

Appellees.

MOTION TO ALLOW AND TAX COSTS.

EVERETT C. McKEAGE,
Chief Counsel,
J. THOMASON PHELPS,
Senior Counsel,
WILSON E. CLINE,
MARY MORAN PAJALICH,
Associate Counsel,
514 State Building, San Francisco 2, California.
Counsel for Appellants.

PRENAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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Appellees.

MOTION TO ALLOW AND TAX COSTS.

Appellants respectfully move the above-entitled Court to allow and tax their entire costs on appeal against appellees United Air Lines, Inc., and Catalina Air Transport in the above-entitled proceeding, and allege as follows:

1. On the 25th day of June, 1952, United Air Lines, Inc., and Catalina Air Transport filed a complaint for declaratory relief and injunction against appellants above

named in the Southern Division of the United States District Court for the Northern District of California.

2. That thereafter Civil Aeronautics Board filed its appearance as intervenor.

3. On the 28th day of January, 1953, three-Judge Court for said Northern District entered its judgment in favor of plaintiffs (appellees), and against defendants (appellants).

4. On November 30, 1953, the above-entitled Court reversed said judgment rendered by said three-Judge Court.

5. That in reversing the decision of said three-Judge Court, the above-entitled Court made no order respecting the allowance of costs on appeal to appellants, and that there is no provision in the mandate from the Clerk of the above-entitled Court for the allowance of such costs.

6. That Rule 32(3) of the rules of the above-entitled Court provides:

> "In cases of reversal of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case."

7. That in accordance with said rule and long established practice, appellants, as the prevailing parties, are entitled to recover their entire costs on appeal from appellees United Air Lines, Inc., and Catalina Air Transport, in the absence of any order of the above-entitled Court to the contrary.

8. That appellants do not seek to recover any costs from the United States or any officer or agency thereof, and that Rule 32(5) of the rules of the above-entitled Court is inapplicable herein.

9. That appellants' costs on appeal, which are but a fraction of the costs it has incurred by virtue of the complaint of United Air Lines, Inc., and Catalina Air Transport, are as follows:

Clerk	$ 409.32
Cost of printing record	959.39
Cost of printing statement	226.94
	$1,595.65

WHEREFORE, appellants respectfully pray that the above-entitled Court make its order allowing appellants to recover the entire sum of $1,595.65 as and for its costs on appeal of and from appellees United Air Lines, Inc., and Catalina Air Transport.

Dated, San Francisco, California,
January 21, 1954.

Respectfully submitted,

EVERETT C. MCKEAGE,
Chief Counsel,
J. THOMASON PHELPS,
Senior Counsel,
WILSON E. CLINE,
MARY MORAN PAJALICH,
Associate Counsel,
Counsel for Appellants.

State of California,
City and County of San Francisco—ss.

EVERETT C. McKEAGE, being first duly sworn, deposes and says:

That he is Chief Counsel of the Public Utilities Commission of the State of California, and as such makes this affidavit for and on behalf of appellants in the above-entitled action; that he has knowledge of the facts relative to the costs and disbursements itemized in the foregoing Motion to Allow and Tax Costs; that said items of costs and disbursements are correct, and that said costs were incurred and expended by appellants in said cause as therein stated.

EVERETT C. McKEAGE.

Subscribed and sworn to before me this 21st day of January, 1954.

(Seal)

R. J. PAJALICH,
Secretary, Public Utilities Commission
of the State of California.